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ADDITIONAL RULES
OF THE
COURT OF CHANCERY OF NEW JERSEY.

PROMULGATED OCTOBER 17TH, 1882.

212. For the 209th rule the following shall be substituted: Hereafter, when a defendant desires such relief as by the existing practice can only be obtained by means of a cross-bill, it shall not be necessary to file such bill to obtain it; but he may set up in his answer matter which would now be the proper subject of a cross-bill and obtain relief thereon. He shall preface such matter with a statement that it is exhibited by way of cross-bill, in the form following:

And this defendant by way of cross-bill exhibited against the complainant (or defendant ———, as the case may be), says:

And he may ask answer on oath. Where it is exhibited against a co-defendant, he shall serve a copy of the answer on such defendant in five days from the date of filing, unless the court shall give further time. If the answer in the nature of a cross-bill be exhibited against the complainant he shall answer it (on oath, if required), by special replication following the general replication to the rest of defendant's answer, in the form provided in the 213th rule, to be filed within the same time now fixed for replying. If against a co-defendant, such co-defendant shall answer by a pleading in the form of an answer (and on oath, if required), to be filed in thirty days from the time of

ADDITIONAL RULES.

serving the copy of the answer to which he is called upon to respond. Issue shall be joined on the responsive pleading (whether it be by special replication or answer) by the filing of a note in the following form :

The defendant (or the defendant ———, if there be several defendants in the cause) joins issue on the special replication (or answer, as the case may be), of ——— to his answer in the nature of a cross-bill.

Such note shall be filed in fifteen days from the expiration of the time for filing such replication or answer.

213. The general replication to an answer shall be in form as follows :

The complainant joins issue on the answer of the defendant.

The replication to an answer, part of which is in the nature of a cross-bill, shall be in the form following :

The complainant joins issue on so much of the defendant's answer as is not in the nature of a cross-bill, and as to that part of said answer which is in the nature of a cross-bill, he says (proceeding to answer the cross-matter).

214. The general charge of confederacy in bills, and the clause reserving exceptions, and the general clause denying combination, and the general traverse, and the general profert of proof in answers, shall be omitted.

215. The 210th rule as amended is as follows: Any objection to a bill, or any answer or special replication or any part thereof, may be made and adjudicated upon, on motion, without the filing of a demurrer or exceptions, but the notice of such motion (which shall be an eight-days' notice) must state the particular ground or grounds of objection. The making of a motion under this rule shall be deemed a waiver of the right to demur or except.

NEW JERSEY EQUITY REPORTS.

VOLUME XXXVI.

STEWART 9

ERRATA.

On page 124, line 11, *for* "amount" *read* "answer."

On page 161, line 7, *for* "when the grantee takes possession of the premises" *read* "when it bears date."

On page 333, line 27, *for* "92" *read* "924."

REPORTS
—OF—
CASES DECIDED IN
THE COURT OF CHANCERY,
THE PREROGATIVE COURT,
AND, ON APPEAL, IN
The Court of Errors and Appeals
OF THE
STATE OF NEW JERSEY.

JOHN H. STEWART, REPORTER.

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EX-OFFICIO JUDGES.

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“ BENNET VAN SYCKEL,

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of the
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CLERK.

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NOTE.

This volume contains the opinions delivered in the Court of Chancery and Prerogative Court at the October Term, 1882, and February Term, 1883, and also those on appeal at November Term, 1882, and March Term, 1883; and the new *Rules* 212-215.

By the Chancellor's direction, the following opinions have not been published:

Oct. Term, 1882—Lewis *v.* Cranmer; Railway Sav. Inst. Case; Mueller *v.* Mueller.

Feb. Term, 1883—Cubberly *v.* Cubberly; Rigg *v.* Hancock; Comrs. Sinking Fund *v.* Runyon.

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CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1882.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET AND JOHN T. BIRD, ESQS.,
VICE-CHANCELLORS.

WILLIAM H. PERRINE

v.

MARY WHITE et al.

On a creditor's bill to set aside as fraudulent a conveyance of land, the grantor and grantee answered, but only the former was sworn in the cause. There was a decree for complainant. On an application for a rehearing it was held that the allegation of the grantor (though sworn to by her) that she could not remember the facts of the transaction, and that when she informed her counsel of her intention to write to the grantee, who was absent from the state, to come home and testify, he told her it would be of no use, was not ground for granting the rehearing.

Perrine v. White.

Petition for rehearing or a new trial. On petition and affidavit of verification.

Mr. C. F. Hill, for petitioners.

Mr. P. H. Gilhooly, for complainant.

THE CHANCELLOR.

This is a creditor's suit, the object of which is to set aside as fraudulent, as against the complainant's judgment, certain conveyances of real and personal estate, respectively made by the defendant, Mary White, the debtor, to her two sons, James A. McDowell and Oscar Johnson, respectively. The sons are also parties to the suit. They and she answered, and the suit was duly brought to a final hearing, and, after argument, a decree was made in favor of the complainant. McDowell, to whom the real estate was conveyed, and Mrs. White join in a petition for a rehearing. Though he answered, he was not sworn as a witness. His mother was. The ground for the application is that Mrs. White could not remember the facts and circumstances of the making of the conveyances to McDowell in question, and that when she told her counsel that she was going to write to McDowell to come home and testify, he told her it would be of no use or advantage whatever to her to have his testimony. The petition is signed by new solicitors and counsel, and not by the petitioners. Mrs. White alone swears to it, and it is not

NOTE.—Knowledge or negligence of counsel binds the party, so as to prevent relief in equity, *Dennett v. Dennett*, 44 N. H. 535; *Norris v. Le Neve*, 3 Atk. 35; *Blake v. Foster*, 2 Ball & B. 457; *Sherman v. Ward*, 73 Me. 29; *Wynn v. Wilson*, Hempst. 698. See *Thayer v. Goddard*, 19 Pick. 66; *McDowell v. Morrell*, 5 Lea 279; *Townley v. Jones*, 8 C. B. (N. S.) 289; *Henderson v. Mitchell*, 1 Buil. Eq. 113.

There can be no rehearing of a decree made by consent of counsel, although made without the party's consent, *Harrison v. Rumsey*, 2 Ves. Sr. 488; *Bradish v. Gez*, Amb. 229; *Butterworth v. Clapham*, 1 J. & W. 653; *Gifford v. Thorn*, 1 Stock. 723; *Coster v. Clark*, 3 Edw. Ch. 405; *Jones v. Williamson*, 5 Coldw. 371; *Lawson v. Bettison*, 7 Ark. 401. See *Furnivale v. Bogle*, 4 Russ. 142.

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supported by any other oath. So that, except as he is represented by the solicitors, McDowell does not appear before the court. By the petition, the petitioners practically propose, now that the hearing has been had and the cause decided, and the opinion of the court giving the grounds and reasons for the decision is in their hands, to meet and overcome the evidence of fraud on which the decree is founded. Obviously it would be against good policy to grant this application. A practice which would permit it would not only be unfair, but would unsettle decrees and promote litigation, and invite experiment upon the court. The petitioners acted on the advice of their counsel in the cause, to whose judgment the management of the defence was very properly committed. Among the evidences of fraud were the facts that the deeds had never been delivered; that McDowell did not know of them until a long time after they were made; that ever since the conveyances were made the grantor has continued in possession of the property, and that she has offered to convey part of it in satisfaction of a debt due from her. In addition to these things, the proof of the alleged consideration of the conveyances was unsatisfactory, to say the least of it. Mrs. White states that she could not remember the facts and circumstances of the conveyances to McDowell, and that the counsel advised her on the several occasions on which she proposed to get McDowell's testimony, that his testimony would be of no use or advantage whatever to her cause. So it appears that the matter was frequently canvassed, and the advice

A rehearing cannot be granted in equity on account of the bad advice of counsel, *Warner v. Warner*, 4 *Stew. Eq.* 549; *Smith v. Patton*, 12 *W. Va.* 541; *Shricker v. Field*, 9 *Iowa* 372; *Winchester v. Grosvenor*, 48 *Ill.* 517; *Dickerson v. Combs*, 6 *Ind.* 128; *Hayden v. Moore*, 4 *Bush* 107; or his error or mistake as to the pertinence or force of evidence, *Baker v. Whiting*, 1 *Story C. C.* 218; *Jenkins v. Eldridge*, 3 *Story C. C.* 316; *Lyon v. Bolling*, 14 *Ala.* 754; *Kelley v. McKinney*, 5 *Leu* 164; *Jamison v. May*, 8 *Ark.* 600; or as to the admissibility of evidence, *Robinson v. Sampson*, 26 *Me.* 11; or abandonment of the defence after hearing complainant's argument, *De Carters v. La Farge*, 1 *Paige* 574; *Winchester v. Grosvenor*, 48 *Ill.* 517; or mismanagement of the defence by reason of counsel's delicate position in appearing at the same time for a co-litigant who might be injuriously affected by the establishment of the defence,

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of counsel was that neither she nor McDowell would be benefited by anything the latter could testify to. It does not appear now that the advice was not judicious. What McDowell could swear to is not stated under his oath. The decree has not been enrolled, and this application is for a rehearing or a new trial. A rehearing in this state has never been a matter of course, but it is always granted when the chancellor sees reason to apprehend that a mistake may have been made in the decision, either in law or fact. Only such evidence can be used as was or could have been read on the hearing; new evidence not being permitted on a rehearing. *Brumagim v. Chew*, 4 C. E. Gr. 337; 2 Harr. Prac. Ch. 121. The last-mentioned writer says that the forgetfulness or negligence of parties who are under no incapacity is no foundation for a bill of review. 1 Harr. Prac. Ch. 275. In *Franklin v. Wilkinson*, 3 Munf. 112, it was held that it was not ground for a bill of review that the party was prevented from proving important facts by the wrong advice of his counsel, or that other counsel was prevented by illness from attending the trial. And in *Jones v. Pilcher*, 6 Munf. 425, it was held that the losing or mislaying by the party's counsel of documentary evidence to be used in the cause, so that it could not be found till after the hearing, was not ground for a bill of review. Of the cases cited by the petitioners' counsel, that of *Day v. Allaire*, 4 Stew. Eq. 303, is in point. There the final decree was opened and the defendants let in to

Carmichael v. Snodgrass, 6 Lea 184; or that the party, who was his own solicitor, was compelled to go to another court, *Whitman v. Brotherton*, 3 Tenn. Ch. 393; or was too sick to attend that term, *Lester v. Hoskins*, 26 Ark. 63; or had ceased to attend that court, and employed other attorneys to take charge of the case who did not understand the defence, and permitted judgment to go against defendant without his knowledge, *Chester v. Apperson*, 4 Heisk. 639; or that the counsel originally employed died, and the counsel who succeeded him was not familiar with the case, *Powell v. Stewart*, 17 Ala. 719; or that the attorney could not appear on account of his illness, *Mock v. Cundiff*, 6 Port. 24; or that the counsel retained had not only not appeared to defend the suit, but had appeared for the other party, where only a general retainer to attend to all of defendant's business was proved, *Watts v. Gayle*, 20 Ala. 817.—REP.

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take testimony, on the ground that their solicitor, though duly retained to defend, and paid for his services, abandoned the cause without their knowledge or consent, refused to take the testimony of several material witnesses, and did not appear at the hearing, so that they were unrepresented there. The court distinguishes the case from such a one as this, where the ground is that the solicitor erred in judgment merely in conducting the cause. As before suggested, it does not appear that, in this case, he did err, or that he neglected or in anywise mismanaged the defence. There is no ground for granting a rehearing or for giving leave to file a bill in the nature of a bill of review. It is not alleged that any mistake in law has been made, nor any mistake of fact on the case presented, and there are no newly-discovered facts whatever, nor any which were not, with the witnesses by whom they could be proved, fully known during the progress of the suit, and no misconduct of solicitor or counsel is shown.

The petition will be dismissed, with costs.

WILLIAM L. ELKINS

v.

THE CAMDEN AND ATLANTIC RAILROAD COMPANY.

The directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival railroad. The resolutions also provided for the calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval.—*Held*,

(1) That the proposed purchase was *ultra vires*, and hence could not be executed even if ratified by the stockholders.

(2) That it was void and against public policy, in that its object was to prevent lawful competition.

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(3) That it could be enjoined upon the application of a single stockholder of the purchasing company, and that the fact that such stockholder had obtained his stock after the passage of the resolutions, and with the avowed design of preventing its consummation, would not affect his right to relief.

Bill for injunction. On motion to dissolve the injunction on bill and answer.

Mr. P. L. Voorhees and Mr. B. Williamson, for the motion.

Mr. D. J. Pancoast, Mr. S. H. Grey and Mr. T. N. McCarter, contra.

THE CHANCELLOR.

The bill is filed by William L. Elkins, a stockholder of the Camden and Atlantic Railroad Company, on behalf of himself and the other stockholders, against the company, to restrain it from entering into or executing any agreement with the Philadelphia and Atlantic City Railway Company, for the purchase by the former of the railroad of the latter company, and from entering into or executing any agreement with William Massey for the purchase by it of his interest in the latter company, for the purpose of getting control of the road of that company, and from entering into or executing any agreement with any corporation or corporations, person or persons, for the purchase by

NOTE.—The statute, *21 Jac. I. c. 3*, prohibiting monopolies, has been said to be merely declaratory of the common law, *Norwich Gas Co. v. Norwich City Co.*, *25 Conn. 38*; but see *Com. v. Canal Comrs.*, *5 W. & S. 394*; *Pennock v. Dialogue*, *2 Pet. 1*.

Whether a monopoly can be granted by the legislature, *Hecker v. New York Balance Dock Co.*, *13 How. Pr. 549*, *24 Barb. 215*; *People v. Vanderbilt*, *26 N. Y. 287*, *28 N. Y. 396*; *Enfield Co. v. Hartford R. R. Co.*, *17 Conn. 40*. See *Gibbons v. Ogden*, *9 Wheat. 1*; *Western Union Co. v. Atlantic & Pac. Co.*, *5 Nev. 102*.

The grant of a monopoly must be express, and can never be implied, *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, *11 Leigh 42*; *Gaines v. Coates*, *51 Miss. 335*; *Mohawk Bridge Co. v. Utica R. R. Co.*, *6 Paige 554*; *Thompson v. New York R. R.*, *3 Sandf. Ch. 625*; *McLeod v. Burroughs*, *9 Ga. 213*; and such will be the construction of a personal covenant, *Stull v. Westfall*, *25 Hun 1*;

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it of any of the property or stock of the latter company for any purpose not necessary for the proper operation of its own road. The bill states that it is the purpose of the defendant and its board of directors, in its name and with its funds, either to purchase of the Philadelphia and Atlantic City Railway Company its railroad (which runs, as does that of the defendant, from the city of Camden to Atlantic City), for a very large sum of money, or to purchase of William Massey, who, it alleges, is the owner of the greater part of the stock and property of that company, his interest therein, for the sum of \$500,000, over and above certain debts and liabilities of that company, estimated to amount to \$200,000, to be assumed and paid by the defendant as a part of the consideration of the purchase; that the terms of the agreement to make the purchase of Massey had already, when the bill was filed, been agreed upon between him and the president of the defendant, and that at a meeting of the board of directors of the defendant, held in Camden, on the 29th of May last, a resolution was passed in favor of the execution of the agreement to purchase from Massey his interest for the before-mentioned consideration. The bill further states that it is the design of the president and board of directors of the defendant to purchase, with the funds and in the name of the defendant, either the entire property of the Philadelphia and Atlantic City Railway Company, or a controlling interest therein, with a view of uniting the property, business and management of that

Stephens v. Aulls, 3 T. & C. (N. Y.) 781; *Williams v. Tiedemann*, 6 Mo. App. 269.

A municipal corporation cannot grant a monopoly, as an exclusive right to run omnibuses in the city, *Logan v. Pyne*, 43 Iowa 524; or to slaughter animals, *Chicago v. Rumpff*, 45 Ill. 90; *Live Stock Assn. v. Crescent City Co.*, 1 Abb. (U. S.) 388; *Nash's Case*, 33 U. C. Q. B. 181. See *Belden v. Fagan*, 22 La. Ann. 545; *Slaughter House Cases*, 16 Wall. 36; *Crescent Co. v. Butchers' Co.*, 9 Fed. Rep. 743; or to manufacture and supply illuminating gas, *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Norwich Gas Co. v. Norwich City Gas Co.*, 25 Conn. 20; *East St. Louis v. St. Louis Gas Co.*, 98 Ill. 415; *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505; but see *State v. Milwaukee Gas Co.*, 29 Wis. 454; *People v. Bowen*, 30 Barb. 24, 21 N. Y. 517; or prevent one citizen only from carrying on a dangerous business in the city, *Hudson v. Thorne*, 7 Paige 261; *Tugman v. Chicago*, 78 Ill. 405. See *Richmond R. R. Co. v. Richmond*, 96 U.

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company with those of the defendant; and it charges that the scheme is foreign to the object and purposes of the defendant, beyond its powers, unlawful in its character and against the best interests of its stockholders, and that, if executed, it will result in irreparable injury to the complainant and the other stockholders of the defendant. On the filing of the bill an injunction was issued pursuant to the prayer thereof. The defendant has answered, and now, on the bill and answer, moves to dissolve the injunction. The answer, while it denies that the agreement referred to in the bill is as therein stated, admits that an agreement has been made between the president of the defendant, on its behalf, and Massey, for the sale by the latter to the defendant, for the consideration of \$500,000, to be paid in the defendant's first mortgage bonds, of his stock, bonds and other claims of and against the Philadelphia and Atlantic City Railway Company, and certain rolling stock of his. The following is the property bargained for:

First mortgage bonds.....	\$224,000 00	
Interest unpaid to July 1st, 1882,		
inclusive	74,560 00	
		<hr/> \$294,560 00
First mortgage bonds, held as col-		
lateral security.....	\$70,400 00	
Interest unpaid to July 1st, 1882,		
inclusive	27,104 00	
		<hr/> \$97,504 00

S. 521; or to provide a market-house, *Gale v. Kalamazoo*, 23 Mich. 344; *Cougot v. New Orleans*, 16 La. Ann. 21. See *Caldwell v. Alton*, 33 Ill. 416; *Bloomington v. Wahl*, 46 Ill. 489; or to establish and run a ferry, *Minturn v. Larue*, 23 How. 435; see *Johnson v. Crow*, 87 Pa. St. 184; *Broadway Co. v. Hankey*, 31 Md. 346; *Hall v. Minturn*, 55 N. Y. 676; *Burlington Co. v. Davis*, 48 Iowa 133; *Midland Ferry Co. v. Wilson*, 1 Stew. Eq. 537, note.

A railroad or other corporation has no power, without legislative authority, to transfer or lease its road or franchises to another railroad company, *Kean v. Johnson*, 1 Stock. 401; *Black v. Del. & Rar. Canal Co.*, 7 C. E. Gr. 130, 9 C. E. Gr. 455; *Troy R. R. Co. v. Kerr*, 17 Barb. 531; *Clark v. Omaha R. R.*, 5 Neb. 314; *Johnson v. Shrewsbury R. R.*, 17 Jur. 1015, 3 De G. M. & G. 914; *McMillan v. Mich. South. R. R.*, 16 Mich. 79; *Shrewsbury R. R. v. London R.*

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Floating debt.....	\$236,344	10
Less bonds held as collateral.....	70,400	00
		<hr/>
	\$165,944	10
Interest on the same to July 1st, 1882, about.....	27,500	00
Twenty-six hundred shares of stock.....	130,000	00
Nine locomotives and twenty-seven cars.....	109,299	47
		<hr/>
	\$824,807	57

The agreement, according to the answer, was by its terms to be of no effect, unless first submitted to and approved by the defendant's board of directors, and then ratified by its stockholders. There was also a provision for the purchase of the property by the defendant's president, for himself, or such of the defendant's stockholders as might associate themselves with him or them, in case of the directors or stockholders neglecting or refusing to approve of the agreement. That, however, is of no importance in the decision of the question under consideration. The agreement was made on the 26th of May last, and was to be carried out on the 1st of July following. The answer avers that so far from being an injury to the complainant and the other stockholders of the defendant, the execution of the agreement would be greatly to their advantage, and it avers also that it would be greatly to their advantage if by purchase, lease, uniting or consolidating with the Philadelphia and Atlantic City Railway Com-

R., 17 *Jur.* 845; *Occum Co. v. Sprague Co.*, 34 *Conn.* 529; *Thomas v. West Jersey R. R.*, 101 *U. S.* 71; *East Anglian R. R. v. Eastern Co. R. R.*, 11 *C. B.* 775; *Campbell v. Marietta R. R.*, 23 *Ohio St.* 168; *Lauman v. Lebanon Valley R. R.*, 30 *Pa. St.* 42; *Pinto Co. Case*, *L. R.* (8 *Ch. Div.*) 273; *Boston R. R. v. New York R. R.* (R. I.), 23 *Alb. L. J.* 518; *Campbell's Case*, *L. R.* (9 *Ch. App.*) 1; *Simpson v. Westminster Co.*, 8 *H. L. Cas.* 712; *Era Ins. Co.*, 6 *Jur.* (N. S.) 1334; *Smith v. St. Louis Ins. Co.*, 2 *Tenn. Ch.* 727; *Price v. St. Louis Ins. Co.*, 3 *Mo. App.* 262; *Cozart v. Georgia R. R.*, 54 *Ga.* 379; or to consolidate with another, *York R. R. Co. v. Winans*, 17 *How.* 30; *International R. R. v. Bremond*, 53 *Tex.* 96; *Charlton v. New Castle R. R. Co.*, 5 *Jur.* (N. S.) 1096; *McCray v. Junction R. R.*, 9 *Ind.* 359; *State v. Bailey*, 16 *Ind.* 46. See *Central R. R. Co. v. Georgia*, 40 *Ga.* 582, 92 *U. S.* 665; *State v. Greene Co.*, 54 *Mo.* 540; *Denike v. New York Lime Co.*, 80 *N. Y.* 599; *Chicago R. R. v. Lake Shore R. R.*, 11 *Rep.* 323; *Field on Corp.* chap. XVI. Not even by the as-

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pany, the defendant could have the management and operation of the railway of that company, and use and operate it as a branch or lateral road. The latter road is a rival road. It is a narrow-gauge road, while the defendant's is of the ordinary gauge. The Philadelphia and Atlantic City Railway Company is insolvent, proceedings for foreclosure and sale of its road under the mortgage (for \$500,000) thereon being now in progress in this court, and the road is now, by leave of this court, in the hands of, and operated by, the trustees for the bondholders under that mortgage. It appears, by the answer, that the defendant's board of directors have approved of the agreement in question, and that they do not intend to take any steps to carry it out, unless it be ratified by the stockholders. But though the answer avers that it is not the intention of the president and directors to act in the matter without the full consent, approval and direction of the stockholders, it must be understood that it does not mean to say that they will not act without the consent of all the stockholders, for otherwise the filing of the bill by the complainant, a dissentient stockholder, would have put an end to the matter, at least until his consent should have been obtained. What it means, undoubtedly, is that they will not act without the consent of the holders of a majority of the stock.

It is quite clear that unless the purchase in question can be sustained as a union or consolidation of the defendant with the other company, it cannot be sustained at all. On its face it is

sent or ratification of all the stockholders, *Ashbury R. R. Co. v. Riche*, L. R. (9 Exch.) 224, (7 H. L.) 653, 14 Moak 81, note; *Colman v. Eastern Co. R. R.*, 10 Beav. 1; *National Trust Co. v. Miller*, 6 Stew. Eq. 155; *New Orleans R. R. Co. v. Harris*, 27 Miss. 517; *Albert Assurance Co., L. R.* (6 Ch. App.) 381; *Eakin v. St. Louis R. R.*, 3 Cent. L. J. 655.

Nor power to become a stockholder in another railroad, *Central R. R. Co. v. Collins*, 40 Ga. 582; *Compagnie Française v. Western Union Co.*, 11 Fed. Rep. 842; *Salomons v. Laing*, 6 Eng. Railw. Cas. 289; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Franklin Co. v. Lewiston Inst.*, 68 Me. 43; *Taylor v. Earle*, 8 Hun 1; *Buford v. Keokuk Co.*, 3 Mo. App. 159. As to purchasing its own shares, see *Dronfield Co.'s Case*, L. R. (17 Ch. Div.) 76; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Barton v. Port Jackson Co.*, 17 Barb. 397; *Green's Brice's Ultra Vires* 94; *Hope v. International Soc.*, L. R. (4 Ch. Div.) 327. An agreement by two or more stockholders to buy a majority of

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merely the purchase by the defendant, as a speculation, of stock and bonds, and floating debt of an insolvent corporation, together with rolling stock which it cannot use on its own road. In that view it is so obviously foreign to the objects for which the defendant was incorporated, so utterly unauthorized by any law, and so clearly beyond its powers, that no attempt is made in the answer, nor was any made on the argument, to sustain it on that ground; but the effort was made to sustain it on the ground that it is, in effect and in fact, a union and consolidation with the rival company, or an acquisition of the road of that company, as a lateral road. And inasmuch as on its face the agreement is neither of those things, it was urged that the court should, if it appears that the proposed purchase is designed merely as means for such union and consolidation or acquisition, have regard to the object and purpose rather than to the means by which they are both effected. By the general railroad law (*Rev. p. 930 § 17*) and the act of 1880 (*P. L. of 1880 p. 231*), power is given to railroad companies to lease their roads, or any part of them, to any other corporation or corporations of this or any other state, or to unite and consolidate as well as merge their stock, property and franchises and roads with those of any other company or companies of this or any other state, or to do both; and it is provided that after such lease or consolidation the company acquiring the other's road may use and operate such road, and its own roads, or any of them. The purchase in question here has no reference to the

the stock and control the corporation thereafter, is unenforceable, *Jacobs v. Miller* (N. Y.), 15 Alb. L. J. 188. See *McMurray v. Northern R. R.*, 23 Grunt's Ch. 134.

Contracts between rival railroads to prevent competition will not be enforced, *Wiggins Ferry Co. v. C. & A. R. R.*, 5 Mo. App. 347, 73 Mo. 389; *Hartford R. R. v. New Haven R. R.*, 3 Rob. (N. Y.) 411; *Peoria and Rock Island R. R. v. Mining Co.*, 68 Ill. 489, 12 Am. Law Reg. (N. S.) 284, note; *Shrewsbury R. R. v. London R. R.*, 17 Jur. 845; *Pearce v. Peru R. R.*, 21 How. 441; but, on the contrary, may be restrained, *State v. Hartford R. R.*, 29 Conn. 538; *People v. Albany R. R.*, 24 N. Y. 261; or between a railroad and express company, *Sandford v. R. R. Co.*, 24 Pa. St. 378; *New England Ex. Co. v. Maine R. R. Co.*, 57 Me. 188; *Southern Ex. Co. v. Nashville R. R. Co.*, 20 Am. Law Reg. (N. S.) 590, 602, note; *McDuffee v. Portland R. R.* 58 N. H. 430; *Texas Ex. Co. v. Texas R. R. Co.*, 6 Fed. Rep. 426; so, between

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acquisition of the narrow-gauge road by lease. But it is, as before stated, claimed that it is designed to enable the defendant to acquire the control and use of that road. That design is not directly avowed in the answer. It is charged in the bill, however, and is not denied in the answer, and it is a fair inference from the latter, that such and no other is the design. The object is to obtain ownership of so great a part of the stock, indebtedness and property of the narrow-gauge company, as to enable the defendant by means thereof to become the purchaser of its property at the foreclosure sale, or to have control of it after such sale in any re-organization of the company. But the acts of the legislature before referred to, while they give the defendant power to unite and consolidate with the other company, give it no power to purchase the debts of that company or its road, and it has no power to borrow money for either of those purposes. Union and consolidation of two railroad companies are one thing, and the purchase by one company of the property and franchises of the other, is another. What the defendant proposes to do is, not to unite and consolidate with the other company, but to purchase the means of controlling the property and franchises of that company, and for that purpose to borrow half a million dollars on mortgage of its own property and franchises. It has no power to borrow money for that purpose, and if it had the money in its treasury it would have no right to use it for that purpose. The purchase of a rival railroad is (not to

manufacturers, *Central Salt Co. v. Guthrie*, 35 Ohio St. 666; *Hilton v. Eckersley*, 6 E. & B. 47; *India Bagging Assn. v. Kock*, 14 La. Ann. 168; or, producers and dealers, *Morris Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Clancey v. Onondaga Salt Co.*, 62 Barb. 395; *Craft v. McConoughy*, 79 Ill. 346; *Arnot v. Pittston Coal Co.*, 2 Hun 591, 68 N. Y. 558; *Crawford v. Wick*, 18 Ohio St. 190; *Raymond v. Leavitt*, 46 Mich. 447; or proprietors of boats, *Stanton v. Allen*, 5 Denio 434; *Pratt v. Tapley*, 3 Pugs. 163; *Hooker v. Vandewater*, 4 Denio 349; *Anon.*, 2 Whart. Prec. *658; *Murray v. Vanderbilt*, 39 Barb. 140. See *Palmer v. Stebbins*, 3 Pick. 188; *Collins v. Locke*, L. R. (4 App. Cas.) 674; *Jones v. Fanning*, *Morris* 348; or of two lines of stages, *Bennett v. Dutton*, 10 N. H. 481; or a railroad company and a ferry company, *Lyde v. Eastern R. R. Co.*, 36 Beav. 10; or a railroad company and a stage-owner, *Marriott's Case*, 1 C. B. (N. S.) 499; See *Parker v. Great Western R. R.*, 11 C. B. 545; *Wiswall v. Greenville Co.*, 3 Jones Eq. 183; or a railroad company and parlor car company, *Pullman*

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speak of public policy) foreign to the objects for which the defendant was incorporated. Nor can the purchase be regarded as within the authority given by the defendant's charter to build lateral or branch roads. The charter authorizes the company to construct a railroad (the main line) from the city of Camden, or some point in the county of Camden within a mile of the city, to run to the sea at or near Absecon inlet in Atlantic county, and two branches from some convenient point in the main road, to be determined by the company, one to run to Batsto village in Burlington county, and the other to May's Landing in Atlantic county. *P. L. of 1852 p. 265*. The narrow-gauge road runs, as before stated, from Camden to Atlantic City. Obviously, the acquisition of it cannot be regarded as authorized by a grant of power to build branches from the defendant's main line to Batsto and May's Landing. The transaction under consideration must be regarded as an agreement to buy stock and bonds, and unsecured debt of an insolvent corporation. As such, irrespective of the assumed ulterior object in the purchase, it is not even suggested that it is legitimate. It does not appear that the rolling stock included in the bargain, and valued therein at \$109,000, is to be purchased for use on the defendant's road, but it is reasonable to conclude that it is not, seeing that it is adapted to the narrow-gauge road, and therefore not to the defendant's. Moreover, it is apparent that the agreement is to be regarded as a whole, and is so regarded by the defendant. As

Palace Car Co. v. Texas and Pacific Co., 11 Fed. Rep. 625, and 632, note; or a railroad company and telegraph company, *Western Union Co. v. Union Pac. Co.*, 3 Fed. Rep. 1; *Western Union Co. v. St. Joseph R. R.*, *Id.* 430; *Western Union Co. v. American Union Co.*, 65 Ga. 160; *Atlantic & Pac. Co. v. Union Pac. R. R.*, 1 Fed. Rep. 745; *Western Union Co. v. Burlington Co.*, 11 Fed. Rep. 1, 10, note; *Western Union Co. v. Kansas Pac. R. R. Co.*, 4 Fed. Rep. 284; or injurious discriminations in the delivery or transportation of freight, *Rogers Loco. Works v. Erie R. R. Co.*, 5 C. E. Gr. 379; *Chicago & N. W. R. R. v. People*, 56 Ill. 365; *Crouch v. London & N. W. R. R.*, 14 C. B. 255; *Garton v. Bristol R. R.*, 6 C. B. (N. S.) 639; *Pickford v. Grand Junction R. R.*, 10 M. & W. 399; *McDuffee v. Portland R. R.*, 52 N. H. 430, 455; *Twells v. Pa. R. R. Co.*, 3 Am. Law Reg. (N. S.) 728, 733, note; *Union Locomotive Co. v. Erie R. R. Co.*, 8 Vr. 23; *David v. Western Union R. R.*, 1 Cin. S. C. 100. See *Fitchburg R. R. v. Gage*, 12 Gray 393; *Baxendale v. Great Western R. R.*, 5

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a purchase with a view to extinguishing competition the transaction is clearly *ultra vires*. *Colles v. Trow City Directory Co.*, 11 Hun 397.

It is urged that to induce this court to interfere by injunction in such a case as this, it must appear that the complainant will, if it withholds its prohibition, sustain irreparable injury, and it is insisted that so far from being an injury to the stockholders the proposed purchase will be of very great advantage. It is also urged that the complainant is a mere volunteer; that he acquired his stock after the negotiations for the purchase in question were begun, and got it for the very purpose of defeating the project. To dispose of the latter objection: It appears that the complainant is a stockholder. If, in fact, he acquired his stock at the time and with the design alleged in the answer, that would not affect his right to the relief which he seeks. But those things appear only from the averments of the answer, and those averments are not responsive and are therefore no evidence, and if they were they are not verified. As to the former objection: The proceeding in question is, as before stated, strictly *ultra vires*. In such a case equity will give such appropriate relief as may be practicable against the illegal act, and that, too, at the suit of a single stockholder; while on the other hand, it will not interfere in a matter involving no breach of trust but only error of judgment on the part of the representatives of the company, even though such error may eventuate in the injury

C. B. (N. S.) 309; *Chicago R. R. v. Parks*, 18 Ill. 460; *Munhall v. Pa. R. R. Co.*, 92 Pa. St. 150; *Morris and Essex R. R. v. Sussex R. R.*, 5 C. E. Gr. 543; *Stewart v. Lehigh Valley R. R. Co.*, 9 Vr. 505.

A contract between a railroad company and a telegraph company, whereby the former agreed to give the latter the exclusive right of way for telegraphic purposes, so far as it legally might, and to discourage competition, was held not void, *Western Union Tel. Co. v. Chicago & P. R. R.*, 86 Ill. 246; *Western Union Co. v. Atlantic & Pac. Co.*, 7 Biss. 367; so, of a contract by an individual not to run, own or be interested in any line of packet boats on the Erie canal, *Chappel v. Brockway*, 21 Wend. 157; or not to run boats on a certain line of travel, *California Nav. Co. v. Wright*, 6 Cal. 258; *Oregon Nav. Co. v. Winsor*, 20 Wall. 64; *Dunlop v. Gregory*, 10 N. Y. 241; but see *Wright v. Ryder*, 36 Cal. 342; or a stage-coach, *Pierce v. Fuller*, 8 Mass. 223; *Hearn v. Griffin*, 2 Chit. 407; or to furnish recruits for an army, *Marsh v. Russell*, 66 N.

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of the stockholders. *Potter on Corp.* 130, 131, 132; *High on Inj.* § 767; *Boone on Corp.* §§ 148, 149; *Kean v. Johnson*, 1 *Stock.* 401; *Gifford v. N. J. R. R. Co.*, 2 *Stock.* 171; *Beman v. Rufford*, 6 *Eng. Law & Eq.* 106; *Grant on Corp.* 290; *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 3 *C. E. Gr.* 178; *Black v. Del. & Rar. Can. Co.*, 9 *C. E. Gr.* 455. In a recent case, *Hawes v. Contra Costa Water Co.*, 31 *Am. Law Reg. (N. S.)* 252, the supreme court of the United States, in laying down the principles governing the class of cases in which a stockholder of a corporation may maintain a suit in equity in his own name, founded on a right of action existing in the corporation itself, and in which it is the appropriate complainant, recognized the following grounds: Where some action is taken or threatened by the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by the charter or other source of organization; or where there is such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other stockholders, as will result in serious injury to the corporation or to the interests of the other stockholders; or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other stockholders; or where the majority of the stockholders themselves are oppressively and illegally pursuing a course, in the name of the cor-

Y. 288; see *Skeels v. Phillips*, 54 *Ill.* 309; or to keep a hotel, *Mossop v. Mason*, 16 *Grant's Ch.* 302, 17 *Id.* 360, 18 *Id.* 453; *McAlister v. Howell*, 42 *Ind.* 15; *Hooper v. Broderick*, 11 *Sim.* 47; or a school, *Spier v. Lambdin*, 45 *Ga.* 313; or not to start a rival newspaper, *Beal v. Chase*, 31 *Mich.* 490. See *Presbury v. Fisher*, 18 *Mo.* 50; or to carry newspapers, *Fallon v. Chronicle Co.*, 1 *Mac-Arth.* 485; or a contract between a railroad and an elevator company that the latter should handle all through grain exclusively, *Richmond v. Dubuque R. R.*, 33 *Iowa* 422; as to trades-unions, see *Master Stevedores Assn. v. Walsh*, 3 *Daly* 1; *Snow v. Wheeler*, 113 *Mass.* 179; *People v. Fisher*, 14 *Wend.* 9; *Leuther Cloth Co. v. Lorson*, *L. R.* (9 *Eq.*) 345; *Johnston Harvester Co. v. Meinhardt*, 60 *How. Pr.* 168; *State v. Donaldson*, 3 *Vr.* 151; *Rex v. Batt*, 6 *C. & P.* 329; *Wallsby v. Anley*, 3 *El. & El.* 516.

See, further, 1 *Smith's L. C.* 172; *Avery v. Langford*, *Kay* 663; *Gravelly v. Barnard*, 10 *Moak* 836.—REP.

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poration, which is in violation of the rights of the other stockholders, and which can only be restrained by the aid of a court of equity. And the court adds that possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers. In the case in hand, the illegal agreement has been made, in behalf of the company, by its president, subject to the approval of the directors and stockholders. The directors have already approved of it. It is true they have provided by resolution for the calling of a special meeting of the stockholders to pass upon it; but the voice of such a meeting could not authorize the project if it be beyond the powers of the corporation. It is enough to warrant the interference of this court to know that it is the admitted intention of the board to execute the illegal agreement, provided the holders of a majority of the stock are favorable to it. The motion to dissolve is denied, with costs.

THE AMERICAN DOCK AND IMPROVEMENT COMPANY et al.

v.

THE TRUSTEES FOR THE SUPPORT OF THE PUBLIC SCHOOLS
et al.

Where a litigation over lands is pending in this court, and the defendant apprehends that his rights may be embarrassed, if not defeated, by the running of the statute of limitations, if the bill should ultimately be dismissed, he may be allowed, for his protection, to try the title to the lands in controversy by an action of ejectment. Such proceedings, however, must be under the control of this court.

Bill for relief. On motion for leave to bring action at law &c.

Mr. T. N. McCarter and *Mr. R. Gilchrist*, for the motion.

Mr. B. Williamson and *Mr. B. Gummere*, contra.

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THE CHANCELLOR.

The receiver for the creditors and stockholders of the New Jersey West Line Railroad Company applies for leave to bring an action of ejectment to try the title to the land in question in this suit, or failing that, for an issue at law for the purpose. The form which the issue at law, where one is ordered in this court, shall take, whether it shall be a feigned issue or whether an action at law shall be instituted, is entirely within the discretion of the court, and such form will be adopted as will best conduce to the purposes of justice. In *Gibbes v. Holmes*, 10 Rich. Eq. 484, the court ordered that the question whether a bond was presumed to be paid to be tried by an action at law, to be instituted as of the date of the beginning of the suit in equity. While the act "to compel the determination of claims to real

NOTE.—In Rhode Island, New Hampshire, Texas, North Carolina and Georgia, the parties have, by statute, a right to a trial by jury of all disputed facts, 2 Dan. Ch. Pr. 1075; *McGowan v. Jones*, R. M. Charlt. 184; *Andrews v. Pritchett*, 66 N. C. 387; and also in Tennessee, *Allen v. Saulpaw*, 6 Lea 477; and in Kansas, *Clemenson v. Chandler*, 4 Kan. 558; and in Ohio, *Ladd v. James*, 10 Ohio St. 437; and in Indiana, *Clem v. Durham*, 14 Ind. 263; and in Iowa, *Wadsworth v. Wadsworth*, 40 Iowa 448; and in Maryland, *Barth v. Rosenfeld*, 36 Md. 604; and in Maine, *Call v. Perkins*, 65 Me. 439; while in other states, the old practice of committing to the discretion of the chancellor the allowance of such trials remains, 2 Dan. Ch. Pr. 1076; *Ringgold v. Patterson*, 14 Ark. 209; *Cahoon v. Kent*, 5 Cal. 294; *Stilwell v. Kellogg*, 14 Wis. 461; *Ray v. Doughty*, 4 Blackf. 115; *Green v. Powell*, 1 Bush 499; *Goodyear v. Providence Co.*, 2 Cliff. 351. See *North Penn. Coal Co. v. Snowden*, 42 Pa. St. 488; *Tabor v. Cook*, 15 Mich. 322; *Byers v. Rodebaugh*, 17 Iowa 53; *Ross v. New England Ins. Co.*, 120 Mass. 113; *Dorr v. Tremont Bank*, 128 Mass. 349.

Numerous instances where an issue has been deemed proper and allowed, are referred to in 2 Dan. Ch. Pr. 1073, note. It has been held to be discretionary in the following additional cases: Malformation, as a ground of divorce, *Anon.*, 35 Ala. 226. See *Wadsworth v. Wadsworth*, 40 Iowa 448; *Von Glahn v. Von Glahn*, 46 Ill. 134; reputation or credibility of witnesses, or doubt as to weight of evidence, *Munson v. Reed*, Clarke Ch. 580; *Isler v. Grove*, 8 Gratt. 257; *O'Brien v. Bowes*, 4 Bosw. 657; *Jarrett v. Jarrett*, 11 W. Va. 584; *Crabb v. Larkin*, 9 Bush 163; *Boulton v. Robinson*, 4 Grant's Ch. 141; forgery of a deed, *Apthorp v. Comstock*, 2 Paige 482; S. C., *Hopk. Ch.* 143, 8 Cow. 386; *De Lancy v. Seymour*, 5 Cow. 714; *Peake v. Highfield*, 1 Russ. 559; or a receipt, *Patterson v. Ackerson*, 1 Edw. Ch. 96; or a will, *State v. Allen*, 2

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estate in certain cases, and to quiet the title to the same" (*Rev. pp. 1189, 1190*), provides that on the application of either party to a suit brought under it, this court shall order an issue at law to try the title, the form of the issue is, as in other cases, in the discretion of this court, which will so mould it as best to effectuate the ends of justice. Where, as in this case, the defendant apprehends that he may be prejudiced or embarrassed, if not defeated, by the operation of the statute of limitations, if the ordinary practice be adhered to, and the bill should ultimately be dismissed for want of jurisdiction, or if there be any other substantial reason for doing so, another form, one that will protect him, will be adopted. In the case in hand, the receiver will be permitted to bring an action of ejectment, which, however, will be under the control of this court, as to the venue

Tenn. Ch. 42; loss of a note, *Fisher v. Carroll*, 6 *Ired. Eq.* 485; or a will, *Brent v. Dold*, *Gilm. (Va.)* 211; misrepresentation of facts, *Magill v. Manson*, 20 *Gratt.* 527; *Nelson v. Armstrong*, 5 *Gratt.* 354; *Bean v. Herrick*, 12 *Me.* 262; right of possession, *Galt v. Carter*, 6 *Munf.* 245. See *Peyton v. Rose*, 41 *Mo.* 257; *Hilleary v. Crow*, 1 *Harr. & Johns.* 542; fraud of a vendee, *Ringgold v. Patterson*, 15 *Ark.* 209. See *Stewart v. Iglehart*, 7 *Gill & Johns.* 138; *King v. Moon*, 42 *Mo.* 551; cancellation of a note by mistake, *Weil v. Kume*, 49 *Mo.* 158; alteration of a bond, *Rucker v. Howard*, 2 *Bibb* 166; or note, *Blakey v. Johnson*, 13 *Bush* 197; contract made by an infant, *Petty v. Malier*, 15 *B. Mon.* 591; existence of agency, *Macaulay v. Proctor*, 2 *Grant's Ch.* 390; or marriage, *Baker v. Wilson*, 6 *Grant's Ch.* 603; *Vaigneur v. Kirk*, 2 *Desauss.* 640; or an advancement, *Clem v. Durham*, 14 *Ind.* 263; reformation of a policy of insurance, *Ross v. New England Ins. Co.*, 120 *Mass.* 113; execution of a power of attorney, *Dorr v. Tremont Bank*, 128 *Mass.* 349; right to mine a particular tract, *McDaniel v. Marygold*, 2 *Iowa* 500; whether moneys were a gift or a trust, *Baker v. Williamson*, 4 *Pa. St.* 456; whether a second deed was intended to destroy a prior trust deed, *Hoffman v. Smith*, 1 *Md.* 475.

A party has been held entitled to an issue as of course in a question of insanity, *Myatt v. Walker*, 44 *Ill.* 485; *Pankey v. Raum*, 51 *Ill.* 88; *Williamson v. Williams*, 3 *Jones Eq.* 446; *Banks v. Booth*, 6 *Munf.* 385; but see *Alexander v. Alexander*, 5 *Ala.* 517; *Atwood v. Smith*, 11 *Ala.* 894; *Beverly v. Walden*, 20 *Gratt.* 147; *Anderson v. Cranmer*, 11 *W. Va.* 562; or duress, *Bray v. Thatcher*, 28 *Mo.* 129; or the validity of a devise, *Kennedy v. Kennedy*, 2 *Ala.* 571; *Hill v. Barge*, 12 *Ala.* 687; *Johnston v. Hainesworth*, 6 *Ala.* 443; 1 *Hoff. Ch. Pr.* 502; *Coalter v. Bryan*, 1 *Gratt.* 18. Where the chancellor directs an action at law to be brought, the verdict, it seems, is conclusive, *Fisher v. Carroll*, 1 *Jones* 30; *S. C.*, 6 *Ired. Eq.* 485. See *Fitzhugh v. Fitzhugh*, 11 *Gratt.* 210.—REP.

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and in all other respects, in the same manner and to the same extent in all things that the issue would be, if in the usual form.

MARY A. B. HOWE

v.

BRIDGET ROBINS et al.

A prayer for process, in a bill, against "the said defendants," without naming anybody, where it does not appear with reasonable certainty, in the other parts of the bill, who are referred to as "the said defendants," and in other parts of the bill some only of the persons who are necessary parties are mentioned as the defendants, is fatally defective, if necessary parties to the suit are thereby omitted.

Bill for relief. On motion to dismiss.

Mr. J. H. Stone, for the motion.

Mr. C. T. Cowenhoven, contra.

THE CHANCELLOR.

The bill is filed to follow trust funds which, it alleges, were invested by a trustee by malversation in property, the title to which he took in his own name, and which he, at his death,

NOTE.—Defendants must be specially named in the bill, and process prayed against them. None are parties against whom process is not prayed, *Windsor v. Windsor*, 2 Dick. 707; *Fawkes v. Pratt*, 1 P. Wms. 592; *Elmendorf v. Delancey*, Hopk. 555; *Talmage v. Pell*, 9 Paige 413; *Bondurant v. Sibley*, 37 Ala. 565; *Bond v. Hendricks*, 1 A. K. Marsh. 592; *Huston v. McClarty*, 3 Litt. 274; see *Ferguson v. Hass*, Phil. (N. C.) Eq. 113; unless out of the jurisdiction, *Haddock v. Tomlinson*, 2 S. & S. 219; *Erwin v. Ferguson*, 5 Ala. 158; see *Brooks v. Burt*, 1 Beav. 109; *Lucas v. Bank*, 1 Stew. (Ala.) 280; or an infant heir whose name is unknown, *Preston v. Dunn*, 25 Ala. 507; *Botsford v. O'Conner*, 57 Ill. 72; *Kirkham v. Justice*, 17 Ill. 107.

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claimed to own as his individual estate. It prays for a decree establishing the rights of the *cestuis que trustent* in the premises, and incidentally for a discovery; also for a distribution of the fund and an injunction to protect it *pendente lite*. Various objections are made to the bill under the notice, some in the nature of a general and others of a special demurrer. The former are not well taken; the latter are. The prayer for process is fatally defective. While the bill prays for process against "the said defendants," without naming any person, it does not appear from the other parts of the bill, with reasonable certainty, who are referred to as "the said defendants." The persons mentioned in the preceding part of the bill as the defendants, are the heirs of the trustee alone—his children. His executrix and his widow have both been subpoenaed to answer, but there is no prayer for process against either of them. They are necessary parties, and so are the other persons interested with the com-

A prayer that, in a certain contingency, which has not happened, another person be made a defendant, does not make him a party, *Doherty v. Stevenson*, 1 Tenn. Ch. 518; see *Valentine v. Fish*, 45 Ill. 462.

The character in which defendant is sued must also appear in the prayer, *Carter v. Ingraham*, 43 Ala. 78; *Brasher v. Van Cortlandt*, 2 Johns. Ch. 242; *Lawson v. Kolbenson*, 61 Ill. 405.

The following cases show what has been held a sufficient designation of the defendant in the prayer for process: Where several stockholders, including the objecting defendant, were mentioned by name, and that the subpoena be directed "to the aforesaid stockholders hereinbefore mentioned and stated," *Carey v. Hillhouse*, 5 Ga. 251; where a grantor left many children, all of whom are dead but the defendants A, B and C, and process prayed against the defendants, *Williams v. Burnett*, Busb. Eq. 209.

The following were deemed insufficient: "That the clerk be ordered to issue subpoenas to the proper defendants," *Hoyle v. Moore*, 4 Ired. Eq. 175; where a corporation was defendant, and the process was prayed against its president and directors, *Verplanck v. Mercantile Ins. Co.*, 2 Paige 438, 1 Edw. Ch. 84; *Walker v. Hallett*, 1 Ala. 379.

Objection may be raised by demurrer, *Wright v. Wright*, 4 Hal. Ch. 143; *Archibald v. Means*, 5 Ired. Eq. 230; *Palmer v. Stevens*, 100 Mass. 461; see *Boon v. Pierpont*, 1 Stew. Eq. 7; *Ferguson v. Hass*, Phil. (N. C.) Eq. 113; but is waived by the defendant appearing and answering, *Seeger v. Thomas*, 3 Blatchf. 11; *Airs v. Billops*, 4 Jones Eq. 17; *Belknap v. Stone*, 1 Allen 572; or appearing and allowing a decree *pro confesso* to be taken, *Brasher v. Van Cortlandt*, 2 Johns. Ch. 242.—REP.

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plainant as distributees of the fund which the suit is brought to recover, and of which the bill prays distribution. The complainant will have leave to amend on payment of costs.

PATRICK KANA

v.

EDWARD BOLTON et ux.

1. A strip of land, running over and along the defendant's lot, had been used, without dispute, for forty years as an alley, and was the only means of access to complainant's lot from the public street of a city. In building an addition to his house in 1871, the defendant built over the alley, leaving sufficient space for its ordinary use, and also put a side door in the addition, opening into that part of the alley which he built over.—*Held*, that defendant had no right to close the alley so as to cut off the use of it by complainant, and that complainant's easement was not affected by a proposition to the defendant and his grantor, in 1865, to buy the right of way through the alley; and *held further*, that complainant was entitled to relief irrespective of the act to quiet titles. *Rev. p. 1189.*

2. The complainant sought by the bill to quiet his title to a lot of land, but raised no question of location in the bill. The defendant neither disclaimed nor otherwise noticed the matter by allegation in his answer or proof, but questioned the location.—*Held*, that the complainant's title to the lot must be established, leaving the question of location undecided.

Bill for relief. On final hearing on pleadings and proofs.

Mr. M. Force and *Mr. W. B. Gourley*, for complainant.

Mr. S. Tuttle, for defendants.

THE CHANCELLOR.

This is a bill for an injunction and to quiet title. In the latter aspect it is filed under the act "to compel the determination

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of claims to real estate in certain cases, and to quiet the title to the same." *Rev. p. 1189*. The object of the injunction is to restrain the defendants from preventing the use by the complainant of an alley-way leading from his lot, in Paterson, over the lot of the defendant, Edward Bolton, to Hamburg avenue. The complainant's lot lies directly in the rear of Bolton's, which abuts upon it; and the alley, which is three feet wide by about eighty feet in length, is at the side of Bolton's lot, and is the only means of ingress and egress to and from the complainant's lot to the street. On the latter lot is a dwelling-house, which appears to have been built about forty years ago. The complainant lives in it with his family. The bill seeks to quiet the title of the complainant to the alley-way, which Bolton completely shut up just before the beginning of the suit, and also to a part of the complainant's lot, the title to which, according to the bill, is disputed by Bolton, who claims to own it. As to this latter matter, it appears that the defendants do not dispute the complainant's title to his lot as described in the bill, but there is a dispute between them as to the location thereof. This question of location is not raised by the pleadings, and does not affect the question of right to the alley-way.

As to the alley, it appears clearly that it has been used as a way from the complainant's lot to Hamburg avenue from the time when the house on the complainant's lot was built, which, as before stated, was about forty years ago. There is no dispute on this point. It also appears that the right of the owners of the complainant's lot to the use of the alley was never disputed until a few days before the filing of the bill, which was in April, 1881. The complainant's lot was bought by his father, part of it in 1843, and the rest in 1849. His father died seized of the property in fee in 1853. His widow, the complainant's mother, died in 1878, and in 1879 the complainant, to whom and his sisters the property descended, became the owner of the entire property. Bolton's property was conveyed to him in 1865, by Alexander Davidson, who bought it a few days previously. In 1871 Bolton built an addition to his house. The addition was built over the alley, leaving a

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clear space of about six feet high under it, which, after that time, was used as part of the alley. A side door of Bolton's house opens on the alley. Bolton appears to have been actuated by hostility to the complainant (with whom he was at enmity at the time) in closing the alley. He closed it at the inner entrance of the alley under the addition. The complainant and those under whom he holds have used the alley for about forty years as the means of ingress and egress to and from his property to the street, and they have had no other. There has been and is no other. Their enjoyment of it appears never to have been interrupted or obstructed until April, 1881, when it was interrupted by Bolton, as before mentioned. Such a user creates a presumption of right. *Lehigh Valley R. R. Co. v. McFarlan*, 14 Vr. 605; *Washb. on Ease.* §§ 70, 71.

It is urged, however, on the part of the defendants, that the complainant is estopped from claiming this right, because in 1865, after Davidson bought the Bolton property, he offered to pay Davidson \$100 for the privilege of the alley, and Bolton testifies that before and about the time he got his deed for his lot (he says he first saw the complainant the night before he bought the property) the complainant asked him to sell him the right of way for his mother, and that he refused, saying that he would not shut up the alley so long as the complainant's mother lived, should he own the property so long. He says, it may be added, that he did not know of the offer to Davidson. In all this, however, there is no evidence of anything except an effort on the part of the complainant (who then owned only an equal undivided one-fourth interest in his lot) to assure by grant, by deed, the title to the right of way. Neither he nor those under whom he claims appear to have disclaimed the right at any time, or admitted that they had no right to it, and the answer does not allege that he or they ever did so. Moreover, they or he were constantly in the use of it. It was an apparent and continuous easement, of which Bolton had notice when he bought his property. When Bolton bought his property, his mother-in-law lived on it. Davidson, though he owned the Bolton lot only four days, was acquainted with the premises and knew of the existence of the alley-way.

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He says he has known it for about forty years. He also says, it may be remarked, that the offers made to him by the complainant were made during the three or four days that he owned the Bolton lot, and therefore after he, Davidson, had become the owner of that lot. He testifies that the alley-way existed thirty-seven or thirty-eight years ago, and was "the proper course into the yard." When Bolton built the addition to his house in 1871, he recognized the claim of the owners of the complainant's lot to the right of way by so building as not to interfere with the enjoyment of the right. The complainant is entitled to relief at the hands of this court, in respect to the alley, and that, too, irrespective of the act to quiet title before referred to. *Shivers v. Shivers*, 5 Stew. Eq. 578, 8 Stew. Eq. 562. The complainant's right is commensurate with and measured by the use. *Ibid.* His claim appears to be to an unobstructed right of way to and from his lot, over a strip of three feet wide along the whole line of Bolton's lot, at the easterly side thereof. He has established such right and there will be a decree accordingly, and a perpetual injunction, with costs.

There will also be a decree establishing his title to his lot by and according to the description set forth in the bill. The defendants not only have not disclaimed, but they have neither taken any notice of nor made any reference to that matter in the answer, and they have not attempted, by proof, to deny such right on his part, though, as before stated, they do dispute the location, but that question, as previously remarked, is not presented by the pleadings.

Hill v. Howell.

AMANDA J. HILL

v.

ROBERT H. HOWELL et al.

A mortgage on lands was given in 1864, payable in two years, with interest at six per cent. The mortgagor conveyed the lands to Smith in 1868, subject to the mortgage. Smith sold and conveyed parts of the lands by warranty deeds, as follows: 1. To McCarter, by deed without date, but acknowledged May 30th, 1868, delivered June 2d, 1868, and recorded June 2d, 1868. 2. To Morford, by deed dated May 27th, 1868, delivered May 30th, 1868, and recorded September 22d, 1868. 3. To Swayze, by deed dated May 30th, 1868, delivered May 30th, 1868, and recorded July 31st, 1868. 4. To Howell, by deed dated June 3d, 1868, acknowledged June 13th, 1868, and recorded June 25th, 1868. 5. To McCarter, by deed in 1869. 6. To Swayze, by deed in 1870. The mortgagee, in April, 1872, released the *fourth* tract from the lien of the mortgage. During 1868, the mortgagor's grantee, Smith, by writing endorsed on the bond, agreed to pay interest thereon at the rate of seven per cent. thereafter.—*Held*,

(1) That as the mortgagee had actual notice and knowledge of the first, second and third conveyances at the time when she released the fourth from the encumbrance of her mortgage, she must, before resorting to the first, second and third tracts, on foreclosure, credit those tracts with the value of the tract released, and that value must be estimated as of 1872, when the release was given, although the tract released was then worth less than it was in 1868, when the deed for it was given.

(2) That as the pleadings raise no question touching the competency of the mortgagee when she executed the release, or attacking its validity, evidence pertaining thereto is irrelevant and cannot be considered.

(3) That, in establishing the liability of 1, 2 and 3 respectively, as McCarter (1) had no notice of the conveyances to Morford (2) and Swayze (3), although both 2 and 3 preceded 1, and neither 2 nor 3 was recorded within the statutory limit of fifteen days, 1 is entitled to priority over 2 and 3. That as there is no competent evidence as to whether 2 or 3 was delivered first, the date must control and be taken as the time of delivery. Hence, 2 has priority over 3, but if 3 was, in fact, delivered before 2, its preference was lost by its not having been recorded within fifteen days after its delivery, and its being actually recorded before 2 will not restore its priority.

(4) The agreement of the mortgagor's grantee, Smith, to pay interest on the mortgage, at seven per cent., having been made after the mortgage debt was due, is valid and binding on his grantees, although never recorded.

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Bill to foreclose. On final hearing on pleadings and proofs.

Mr. A. C. Hopkins, for complainant.

Mr. L. Van Blarcom and *Mr. Joseph Coult*, for estate of Jacob L. Swayze, deceased.

Mr. Thomas Kays, for Theo. Morford and others.

Mr. R. T. Johnson, for Jas. G. Roberts.

THE CHANCELLOR.

This suit is brought for foreclosure and sale of mortgaged premises (containing about one hundred acres) in Sussex county. The complainant's mortgage is dated April 1st, 1864, and was given by Robert H. Howell and wife to Susan Rorbach, now deceased, to secure the payment of \$6,000 (of which \$1,000 have been paid) in two years from date, with interest at the rate of six per cent. per annum, according to his bond to her of that date. Susan Rorbach died January 9th, 1873. Her executors assigned the bond and mortgage, on the 7th of April, in the same year, to Luther Hill, who died soon afterwards, and they were subsequently assigned by his administrators to the complainant. Howell conveyed the mortgaged premises to Dr. Franklin Smith, subject to the mortgage, by deed dated March 10th, 1868. Smith, in that year, conveyed parts of the property as follows: To John McCarter, a tract of nineteen and one-fourth acres, by deed without date, but acknowledged on the

NOTE.—That a release by a mortgagee with notice of subsequent encumbrances, also releases the premises from the lien of intermediate encumbrances, has been frequently decided in this state, *Mickle v. Rambo*, Sax. 501; *Johnson v. Olcott*, 4 Hal. Ch. 561; *Gaskill v. Sine*, 2 Beas. 400; *Hoy v. Bramhall*, 4 C. E. Gr. 563; *Stillman v. Stillman*, 6 C. E. Gr. 126; *Mount v. Potts*, 8 C. E. Gr. 188; and by the following recent decisions elsewhere, *Kendall v. Niebuhr*, 58 How. Pr. 156, 87 N. Y. 1; *Van Slyke v. Van Loan*, 26 Hun 344; *Taylor v. Wing*, 84 N. Y. 471; *Bernhardt v. Lymburner*, 85 N. Y. 172; *Warner v. De Witt Bank*, 4 Bradw. 305; *Hawhe v. Snyderker*, 86 Ill. 197; *Meacham v. Steele*, 93 Ill. 135; *Darst v. Bates*, 95 Ill. 493; *Kelley v. Whitney*, 45 Wis.

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30th of May, 1868, delivered on the 2d of June following, and recorded on that day; to Theodore Morford, a lot of five acres, by deed dated May 27th, 1868, delivered on the 30th of May, and recorded on the 22d of September following; to Jacob L. Swayze, a tract of twenty-six and eighty-two hundredths acres, by deed dated May 30th, 1868, and delivered on that day, and recorded on the 31st of July following; and to Robert H. Howell, a lot of four acres, by deed dated June 3d, 1868, acknowledged on the 13th and recorded on the 25th of that month. All these were warranty deeds. In 1869, he conveyed another part of the property, a lot of about four acres, to John McCarter, and in 1870 he conveyed another part, a lot of three acres, or thereabouts, to Jacob L. Swayze. Susan Rorbach, the mortgagee, in April, 1872, released to Howell, from the operation of the mortgage, the lot conveyed, as before mentioned, by Smith to him in June, 1868. The release is dated and was recorded in that month. Some time in 1868 (the mortgage was then past due) Smith, by writing endorsed on the bond, agreed to pay interest at the rate of seven per cent. per annum from that date. The foregoing facts are all that enter into the consideration of the questions submitted on the hearing. It is therefore unnecessary to state the subsequent conveyances of the McCarter and Swayze lots. Only one of the grantees in those conveyances (James G. Roberts, who claims under McCarter) has answered.

The questions presented are, first, whether the complainant is not bound in equity to credit, as against the tracts conveyed to McCarter, Morford and Swayze respectively, in 1868, the value

110; *Dewey v. Ingersoll*, 42 Mich. 17; *Benton v. Nicoll*, 24 Minn. 221; *McIlvain v. Mutual Assurance Co.*, 93 Pa. St. 30.

The valuation of the part released, it has been held, must be fixed by its value at the time when the mortgage was given, *Stevens v. Cooper*, 1 Johns. Ch. 425; 2 Jones on Mort. § 1627; *Johnson v. Williams*, 4 Minn. 260; *Parkman v. Welch*, 19 Pick. 231.

In *Stillman v. Stillman*, 6 C. E. Gr. 126, after mortgaged premises had been conveyed in two parcels, and the mortgagee released the second parcel, its value was determined by the date of its transfer.

In *Iglehart v. Wesson*, 42 Ill. 261, 272, by the date of the release.

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of the released premises, it being claimed that the mortgagee had, when the release was given, full notice of those conveyances; and, second, what is the order of liability of those tracts to pay the mortgage. As to the first question: To raise the equity claimed to arise from the release, it must be established that the mortgagee had, at the time when the release was made, actual notice of the previous conveyances. The proof establishes that fact. The only evidence on the subject is the testimony of Dr. Smith. He speaks of a conversation he had with the mortgagee, which he swears took place within a year from the time when he acquired the property—that is, prior to March 10th, 1869—in which he says she spoke of the conveyances he had made of parts of the mortgaged premises, and he mentioned to her the names of those to whom he had conveyed. He says he mentioned McCarter, Morford and Swayze, and, he thinks Howell. He further swears that the conversation took place before he made the last conveyance to Swayze, which was in April, 1870. The release is dated in April, 1872. It is quite clear from his testimony on the subject that the mortgagee had, long before she gave the release, notice of the conveyances made in 1868 to McCarter, Morford and Swayze. It is urged on behalf of the complainant, however, that there is evidence of her want of capacity, at that time, to execute the release. It is enough to say that the bill seeks no relief against the release, and there is no issue in the suit raising a question as to her competency, or as to the validity of the release, and therefore the evidence on the subject is irrelevant. As to the value of the

The agreement to pay an increased legal rate of interest after the maturity of the mortgage, binds the parties thereto, *Lewis v. Conover*, 6 C. E. Gr. 231; *Havens v. Jones*, 45 Mich. 253; *Austin v. Bainter*, 50 Ill. 308; see *Eslava v. Lepetre*, 21 Ala. 504; *Harrison v. Stewart*, 3 C. E. Gr. 452; and also subsequent encumbrancers, *Van Doren v. Dickerson*, 6 Stew. Eq. 391; *Conover v. Van Mater*, 3 C. E. Gr. 438; or purchasers of the premises, *Haggerty v. Allaire Works*, 5 Sandf. 230; *Ritter v. Phillips*, 53 N. Y. 586.

Where the record of a mortgage did not disclose the rate of interest secured by such mortgage, a second mortgagee was held bound only by the legal rate, *Whittacre v. Fuller*, 4 Minn. 515. See *Ackens v. Winston*, 7 C. E. Gr. 444; *Richards v. Holmes*, 18 How. 143.—REP.

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released property: It was sold by Smith to Howell for \$4,000, but there were about four years between the date of the deed and the giving of the release, and the amount to be credited is the value at the latter time. The weight of the evidence on the subject is, that in the spring of 1872 the value was \$3,500. That amount must be credited as of the date of the release, before recourse is had to the land conveyed to McCarter, Swayze and Morford respectively, in 1868, for they were all entitled to be postponed to the Howell lot in payment of the mortgage. The deed to McCarter is prior in date, and was recorded within the statutory fifteen days, and Howell had notice, when he took his deed, of the conveyances to Swayze and Morford.

As to the other question: This is to be decided by the application of the established and familiar principle, that when mortgaged premises are alienated in parcels the burden of the mortgage is to be borne by the parcels in the inverse order of alienation. The priority of alienation is to be determined by the law of registration. *Sanborn v. Adair*, 2 Stew. Eq. 338. The deed to McCarter is without date; that to Morford is dated May 27th, 1868, and the deed to Swayze, May 30th in the same year. They were all acknowledged on the 30th. The deed to McCarter was not delivered until the 2d of June, 1868; those to Swayze and Morford were delivered on the 30th of May, 1868. Swayze swears that his deed was delivered to him on that day, and Morford testifies that he thinks his was delivered on the 30th of May. That he is probably correct, appears from the fact that a mortgage which he gave for part of the purchase-money was recorded on the 30th of May. His deed was not recorded until the 22d of September following. The deed to Swayze was recorded on the 31st of July, 1868. It will be seen that neither Morford's nor Swayze's deed was recorded within fifteen days from the time of its delivery, while McCarter's was recorded on the same day on which it was delivered. Neither of these parties had any notice of the conveyance to either of the others when his deed was delivered. Each knew, indeed, that Smith had agreed to convey to the others respectively the land subsequently conveyed to them in pursuance of such agreement

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but neither of them had any notice of the conveyance thereof. It is urged, on behalf of the owners of the Swayze lot, that he had taken possession of it and fenced it before any of the deeds were delivered, and that, therefore, McCarter and Morford had notice of the conveyance to him, but this proposition cannot be maintained, for the obvious reason that his possession and alleged acts of ownership were not evidence of a conveyance. Had McCarter and Morford inquired as to his claim to the property they would have found, not that he had title, but at most, that he had a verbal agreement for a conveyance and had been let into possession under it, and had exercised and perhaps still was exercising ownership over the property. It is also urged that Morford had notice of the conveyance to Swayze by the fact that Morford, who drew his own deed, described his land as bounded in part by land sold to Jacob L. Swayze, referring to the land conveyed by Smith to Swayze by the deed of May 30th. But it is enough to say that the land had not then (May 27th) been conveyed to Swayze, and was not conveyed to him until three days afterwards. On the other hand there is no proof of notice to Swayze of the deed to Morford. Swayze, indeed, says that Smith, when he delivered his deed to him, told him he had Morford's deed also, but that was not notice of a conveyance, for none had then been made—the deed had not then been delivered. McCarter having had no notice of the conveyances to Morford and Swayze, both of which preceded his, is entitled to preference over them, seeing that neither of them was recorded within the fifteen days. As to the deed to Swayze, there is no competent evidence that it was delivered before Morford's. Swayze, indeed, as before stated, swears that Smith, when he delivered his deed to him, said he had Morford's deed also, but does not say that he saw the deed to Morford. Dr. Smith has no recollection on the subject. He says he has no recollection of the delivery of either deed. Clearly, the fact that Dr. Smith told Swayze that he had Morford's deed is not competent, as against Morford, to prove that the deed to the latter had not then been delivered. There is no competent evidence as to which deed was delivered first, and, in the absence of proof, the date will be taken as the

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time of delivery, and in that case Morford is entitled to priority over Swayze. But if Swayze's deed was in fact delivered before Morford's, it lost its preference over the latter by his failure to record it within fifteen days from the time of its delivery; Morford having had no notice of its existence. And, although it was recorded before Morford's, that did not restore the preference. *Sanborn v. Adair, supra*. Morford swears explicitly that when his deed was delivered to him he had no knowledge of the deeds to McCarter and Swayze, or either of them. It may be observed, in reference to the argument of the counsel for Swayze's estate on the subject of notice from possession, that the facts which would be notice of the right of a party to claim a conveyance, as against a grantee of the owner of land, are obviously not notice of an actual alienation. The order of liability, as between the three lots under consideration to pay the mortgage, will be as follows: first, the Swayze lot, next the Morford lot, and lastly the McCarter lot. The lots conveyed to McCarter and Swayze respectively, in 1869 and 1870, are liable before those three lots, or any of them. It is not suggested, nor does it appear, that there will be any difficulty in determining the order of liability as between the present owners of the McCarter lot; that matter will therefore be referred to the master. None of those owners has answered, except Roberts.

A question was suggested as to whether the agreement by Smith to pay interest, at the rate of seven per cent. instead of six, is binding on his grantees, and those who hold or claim under them, seeing that the agreement was not recorded. It is binding on them. *Conover v. Van Mater, 3 C. E. Gr. 481*. When the mortgage was given the legal rate was six per cent. It was changed to seven in 1866, and that rate continued till 1878. The mortgage was past due when the agreement for the higher rate was made.

Vreeland v. Vreeland.

MARTHA VREELAND

v.

JOHN VREELAND et al., executors &c.

A widow may, on tendering a refunding bond, demand of her husband's executors a legacy given to her by his will, and they have no right, on an allegation that the legacy was given to the widow in lieu of her dower, to demand, as a condition of paying the legacy, that she shall give a release of her dower in the real estate.

Bill for a legacy. On final hearing on bill and answer.

Mr. J. W. Griggs, for complainant.

Mr. M. Force, for defendants.

THE CHANCELLOR.

This suit is brought by Martha Vreeland against the executors of the will of her deceased husband, to recover a pecuniary legacy given to her by that instrument. The bill states that the legacy was given to her by the will; that the defendants are the executors, and proved the will; that they have assets in their hands to an amount more than sufficient to pay all the debts and legacies; that more than a year had elapsed from the time of proving the will when the suit was brought, and that the complainant, after the expiration of that period, demanded payment of the legacy from the executors, offering to give them, on receipt of the money, such receipt, release or refunding bond as was required by law in the premises, but that they refused to pay her. By the bill she still makes such offer. The legacy in question was given by a clause of the will which gives to her \$600 and certain goods and chattels, and the free use of the testator's house and real estate for one year after his death. The executors are the testator's sons, to whom, by the next section of

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the will, he gives his real estate "after" her "right expires." They, by the answer, deny none of the statements of the bill, but allege, by way of defence, that the legacies were given to her in lieu of her dower, and that she has accepted them, and has had the goods and chattels and the use of the house and real estate, and that they have the right to demand of her a release of her dower in the real estate on the payment of the legacy. It is enough to say that they have no right, legal or equitable, to demand such release as a condition of payment of the legacy. There will be a decree for the complainant.

ADAH A. PUTNAM

v.

LYDIA A. CLARK et al.

Leave to file a bill of review, on the ground that the complainant has, since decree, discovered the whereabouts of a material witness, of whose existence and materiality she knew when she began her suit, denied on the ground of laches, and the impolicy of allowing a renewal of the litigation.

Bill for relief. Motion for leave to file a bill of review. On petition and affidavits.

Mr. C. H. Hartshorne and Mr. C. Parker, for the motion.

Mr. C. L. Corbin, contra.

THE CHANCELLOR.

The complainant asks leave to file a bill of review, not on the ground of the recent discovery of material evidence, but of the recent discovery of the whereabouts of the witness, William C. Barrett, by whom an important fact can be proved. The fact to be proved is not a new discovery; nor is it a recent discovery

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That the value of the property was fixed by the court in the case of *Putnam v. Clark*, 2 Stev. Eq. 412; S. C. on appeal, 6 Stev. Eq. 535. On the 14th of December, 1880, the complainant instituted an action of debt against Mrs. Clark for the recovery of the bond and mortgage, but on the application of the defendants in this suit on a bill filed by them against her, she was enjoined from prosecuting that action, on the ground that the matter which she sought to litigate in the court of law had already been adjudicated upon here. The action of this court on that subject was affirmed on appeal. *Putnam v. Clark*, 7 Stev. Eq. 532. The suits at law and here were for the same object, but the complainant claimed that she had the right to retry the matter in the court of law because, by reason of the fact that the executors were defendants, she was prevented from giving her own testimony in the suit

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here, whereas, in the suit at law, which was against Mrs. Clark individually, she would not be debarred from testifying in her own behalf. This claim proved unavailing. She now asks leave to file a bill of review because she says she now knows, as she avers she did not until May or June, 1881, where Barrett is. She alleges in her petition that she was unable, up to that time, to ascertain his whereabouts, because he concealed himself. She, of course, is chargeable with knowledge when she filed her bill in this suit in 1876, of the importance of his testimony, and if she supposed she could succeed without it, and therefore did not try to get it, but went on without it, that is no excuse. She stands before the court as a complainant who, having brought suit, has voluntarily gone to hearing without the testimony of a witness of whose existence she knew, but whose testimony she did not deem material or perhaps underestimated, and of whose testimony she was not deprived by the defendants. In the bill she charged that Barrett made the alteration in the assignment after it was executed. On the subject of diligence she says in her petition that, until the decree of this court was pronounced in 1878, it would have been useless to attempt to communicate with him relative to her case, for until then he was in concealment through fear of punishment for his crimes in embezzling the property of his clients. She says she requested two persons, whom she names, and who she says were the only persons that she supposed were in communication with him, to state where he was, but they denied that they had any knowledge of his whereabouts, though she believes that one of them was, in fact, in communication with him. She says she heard rumors, at different times, that he was in Belgium and Ireland, but was unable to trace them to any trustworthy source, and that she at one time addressed a letter to his wife and gave it to one of the persons above referred to, to send to her, but that she never received any reply to it. It appears, from the petition, that it was not until May or June of 1881 that she applied to Barrett's nephew, who lived in New York and was a friend of hers, for information (which she obtained from him) as to the whereabouts of his uncle, though she says he had correspondence with Barrett from

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a period of about two or three years after the latter's flight, which took place in April, 1876; that is, from about April, 1878, or April, 1879. When the correspondence began does not more particularly appear. Whether she might not have discovered Barrett's whereabouts from his nephew, or by his aid, had she applied to him at an earlier day, does not appear. It was not until some months after the final decree of this court had been affirmed by the court of *dernier ressort* that any application was made to the nephew (although, as before stated, he was a friend of hers) to discover Barrett's whereabouts. He says, indeed, in his affidavit, that he did not know until the correspondence took place where Barrett was, but it does not appear that he ever previously tried to ascertain, nor but that he knew where she could get information on the subject. Nor does there appear to have been any indication in the progress of the suit of any effort to get the testimony. The complainant knew of Barrett's whereabouts in or about May or June, 1881, but made no application to file a bill of review until the spring of 1882, when the application was made to the court of errors and appeals. In the meantime, in December, 1881, instead of such application to this court, she began a suit at law to recover the bond and mortgage. I am constrained to conclude that apart from other considerations she has been guilty of laches in the matter, both as to obtaining the testimony and as to the application for the benefit of it to such a degree as to disentitle her to relief in the premises, if she had otherwise been entitled to any. But apart from these considerations, if it were conceded that she has used due diligence to obtain the testimony and in making the application, the prayer of the petition ought not to be granted. The whole matter rests in the sound discretion of the court, which is to be exercised so as to effectuate the ends of justice. "The granting of a bill of review," says Judge Story, "for new-discovered evidence is not a matter of right, but rests in the sound discretion of the court. It may therefore be refused, although the facts, if admitted, would change the decree when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable." *Story's*

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Eq. Pl. § 417. This suit was brought six years ago against those who hold the bond and mortgage for valuable consideration, and without notice of the alleged fraud. It went to decree here four years ago, and was taken by appeal to the court of last resort, where it was decided (as in this court) adversely to the complainant, in December, 1880. The attempt of the complainant to retry the cause at law was successfully resisted by the defendants, on the ground that the subject was *res adjudicata*; that the trial which had been had here was conclusive of the matter between the parties, and therefore that the defendants ought not to be harassed with another litigation. That consideration applies with equal force to the present application. The case is one to which the principle of the maxim which declares the policy of restraining litigation within reasonable limits, is eminently applicable. It would be as unjust as it would be impolitic to grant the prayer of this petition, and subject the defendants to what would be practically the fourth litigation over this matter, which four years ago was decided in their favor in the forum chosen by the complainant, and on the case as made and submitted by her for decision; and thence, went on her motion with like result, to the tribunal of last resort. The injustice and impolicy of granting such an application, under such circumstances, are manifest. The petition will be dismissed, with costs.

MINNA DE KAY et al.

v.

HENRY H. VOORHIS et al.

Under the authority of a statute, certain bonds were issued by a water company, secured by a mortgage on their property and franchises, and forty-eight of those bonds were taken by the contractors who built the company's works, as part payment therefor. All the company's property and franchises were afterwards sold by a receiver in insolvency, subject to all legal liens, and

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bought by the contractors, who re-organized the company and conveyed the property and franchises to the new company, the contractors holding almost all of the stock of the new company. On foreclosure of the mortgage by the holders of twenty-four of the forty-eight bonds, which had been assigned by the contractors—*Held*, that the contractors and the old company and the new company were all estopped from alleging any invalidity in the execution or delivery of the bonds, or want of power of the old company to issue them.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. W. S. Gummere, for complainants.

Mr. John Linn, for Bacot and Ward and the "Hackensack Water Company, re-organized."

Mr. C. H. Voorhis, for Henry H. Voorhis, trustee.

THE CHANCELLOR.

The bill is filed for foreclosure and sale of mortgaged premises in Bergen county. The mortgage is dated September 15th, 1874, and was given by the Hackensack Water Company on all its land and pumps, engines and boilers, machinery, pipes, hydrants, appendages and property of every kind and description, and all its rights, powers, privileges and franchises. It was given to Henry H. Voorhis, trustee, to secure the payment of one hundred and thirty-two bonds, each for \$500, with interest coupons attached, given by the company, payable to the trustee or bearer. The property was subsequently sold, subject to all legal liens and encumbrances, by a receiver, under proceedings against the company in insolvency in this court, and was bought by Robert C. Bacot and John F. Ward for \$2,500. They afterwards re-organized the company by the title of the "Hackensack Water Company, re-organized," and conveyed the property and franchises to it for the consideration, as expressed in the deed, of \$155,000, and it now holds them. Of the one hundred shares of the stock of the company as re-organized, Bacot and Ward, at the time of the re-organization, held all but four, and they were held by the three other persons named in the certificate of re-organization, who, according to the

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statements of that instrument, became stockholders by the transfer by Bacot and Ward to them of the shares which they held. The bill is filed by the holders of twenty-four of the bonds against the trustee, Bacot and Ward, the company as re-organized and the trustees in a mortgage given by the company since the re-organization.

It is admitted that the bonds are due, and it appears that the trustee, before the suit was brought, refused to permit his name to be used as complainant in a suit which it was proposed to bring to foreclose the mortgage. The bill is filed for the benefit of the complainants and such others of the holders of the bonds secured by the mortgage as may come in and seek relief in the suit. The defence set up by Bacot and Ward and the re-organized company (the mortgagees under the mortgage given since the re-organization have not answered) is that the mortgage has no validity because the company had no power to give it, and because the person by whom it purports to have been executed in behalf of the company, as its president, was not its lawful president, and executed the mortgage without any authority; that the execution thereof was not duly acknowledged or proved, and that the mortgage was never delivered to the trustee.

The charter authorized the company to borrow money to an amount not exceeding two-thirds of the amount of the capital stock paid in, and to secure the payment thereof by bonds or other evidences of debt, bearing interest not exceeding seven per cent. per annum, and mortgage upon its property and franchises. *P. L. of 1869 p. 133.* And the answering defendants allege and insist that at the time when the mortgage was given, there had been paid in only \$1,675 on account of the capital stock. The amount of stock was, by the charter, fixed at \$50,000, with power to double it. By resolution of August 1st, 1873, the company increased its stock to the amount of \$100,000. Afterwards, and after the mortgage was given, the company was authorized to increase its stock to \$500,000, and to borrow on mortgage such sums of money as should be necessary to purchase lands or construct and maintain its works &c. This power was given by a supplement to the charter passed April

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8th, 1875. *P. L. of 1875 p. 256.* The company, on the 26th of September, 1874, passed a resolution that one hundred and thirty-three bonds, of \$500 each, dated September 15th, 1874, payable November 1st, 1890, bearing interest at seven per cent. per annum, payable half yearly, with coupons attached, be issued in due form of law to Henry H. Voorhis, trustee, and that a mortgage on all the real estate and property, rights and franchises of the company be executed and delivered to the trustee, in due form of law, to secure the payment of the bonds; and at the same time, it passed another resolution authorizing the treasurer to negotiate those bonds to the best advantage of the company, according to his judgment. Under the first of those resolutions the mortgage in suit was executed and delivered and the bonds issued, and under the other the bonds held by the complainants and others were negotiated. Messrs. Bacot and Ward built the company's works under a contract made by them with it, and the bonds now held by the complainants are twenty-four of forty-eight which, on the 5th of December, 1874, were given to and accepted by Bacot and Ward on account of the contract.

It is quite obvious that Bacot and Ward, having sold and given currency to them, are therefore estopped from denying the legal validity of the bonds or the legality of the lien of the mortgage by which they declare on their face that they are secured. Moreover, they bought the property at the receiver's sale expressly subject to the mortgage, and it is proved that but for that fact the sale would not have been confirmed, in view of the comparative insignificance of the price, which otherwise would have been grossly inadequate. And although the statement was made at the sale that the validity of the mortgage would be disputed, the property was, nevertheless, sold subject to the mortgage and a consequent liability to pay the full amount thereof. It is quite clear that the corporation by which the bonds and mortgage were given would be estopped from denying the validity of those instruments and the lien which the mortgage purports to create, on any of the grounds taken by the defence. *Galveston R. R. Co. v. Cowdrey, 11 Wall. 459.* And

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those defences are not available to the re-organized company, for it got and could get from Messrs. Bacot and Ward only what they obtained by the deed from the receiver and no more; that is, the company's interest in the property, subject to all legal claims and encumbrances and all equities. And it may be added that it does not occupy even the position of a purchaser for value, for it gave only its stock and bonds for the property. And Messrs. Bacot and Ward evidently own all of the stock except the few shares which they have transferred, probably without consideration, to the persons who aided them in the re-organization. It does not, in fact, appear, it may be observed, that the company was not duly organized, nor that the person by whom the mortgage was executed as president was not such officer, nor that the whole of the capital stock was not subscribed and paid in; and it does appear that the execution of the mortgage was duly authorized and that it was duly proved. The property mortgaged was valued by Mr. Bacot, in 1879, at \$82,508.80, and the bonds at par amounted to only \$66,500. If the allegation of the defence is true, that there were only about \$1,700 of the capital stock paid in, it would seem quite probable that the mortgaged premises were in part paid for with the proceeds of the bonds. So far as the property of the company is concerned, it had power, without legislative authority, to mortgage it to secure the payment of its debts. And as to its franchises, it had positive legislative authority to mortgage them, with a limitation (which the answering defendants allege it did not observe) as to the extent to which it should use the power. The equities are all with the complainants. There will be a decree for foreclosure and sale of the mortgaged premises. It appears by the testimony of Mr. Ward that he and Mr. Bacot have obtained control of about seventy-two per cent. of the bonds and have guaranteed the re-organized company against any claims under them. The complainants and the trustee are entitled to their costs, to be paid out of the proceeds of the sale of the mortgaged premises.

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It is quite obvious that Bacot and Ward, having sold and given currency to them, are therefore estopped from denying the legal validity of the bonds or the legality of the lien of the mortgage by which they declare on their face that they are secured. Moreover, they bought the property at the receiver's sale expressly subject to the mortgage, and it is proved that but for that fact the sale would not have been confirmed, in view of the comparative insignificance of the price, which otherwise would have been grossly inadequate. And although the statement was made at the sale that the validity of the mortgage would be disputed, the property was, nevertheless, sold subject to the mortgage and a consequent liability to pay the full amount thereof. It is quite clear that the corporation by which the bonds and mortgage were given would be estopped from denying the validity of those instruments and the lien which the mortgage purports to create, on any of the grounds taken by the defence. *Galveston R. R. Co. v. Cowdrey, 11 Wall. 459.* And

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those defences are not available to the re-organized company, for it got and could get from Messrs. Bacot and Ward only what they obtained by the deed from the receiver and no more; that is, the company's interest in the property, subject to all legal claims and encumbrances and all equities. And it may be added that it does not occupy even the position of a purchaser for value, for it gave only its stock and bonds for the property. And Messrs. Bacot and Ward evidently own all of the stock except the few shares which they have transferred, probably without consideration, to the persons who aided them in the re-organization. It does not, in fact, appear, it may be observed, that the company was not duly organized, nor that the person by whom the mortgage was executed as president was not such officer, nor that the whole of the capital stock was not subscribed and paid in; and it does appear that the execution of the mortgage was duly authorized and that it was duly proved. The property mortgaged was valued by Mr. Bacot, in 1879, at \$82,508.80, and the bonds at par amounted to only \$66,500. If the allegation of the defence is true, that there were only about \$1,700 of the capital stock paid in, it would seem quite probable that the mortgaged premises were in part paid for with the proceeds of the bonds. So far as the property of the company is concerned, it had power, without legislative authority, to mortgage it to secure the payment of its debts. And as to its franchises, it had positive legislative authority to mortgage them, with a limitation (which the answering defendants allege it did not observe) as to the extent to which it should use the power. The equities are all with the complainants. There will be a decree for foreclosure and sale of the mortgaged premises. It appears by the testimony of Mr. Ward that he and Mr. Bacot have obtained control of about seventy-two per cent. of the bonds and have guaranteed the re-organized company against any claims under them. The complainants and the trustee are entitled to their costs, to be paid out of the proceeds of the sale of the mortgaged premises.


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8th, 1875. *P. L. of 1875 p. 256.* The company, on the 26th of September, 1874, passed a resolution that one hundred and thirty-three bonds, of \$500 each, dated September 15th, 1874, payable November 1st, 1890, bearing interest at seven per cent. per annum, payable half yearly, with coupons attached, be issued in due form of law to Henry H. Voorhis, trustee, and that a mortgage on all the real estate and property, rights and franchises of the company be executed and delivered to the trustee, in due form of law, to secure the payment of the bonds; and at the same time, it passed another resolution authorizing the treasurer to negotiate those bonds to the best advantage of the company, according to his judgment. Under the first of those resolutions the mortgage in suit was executed and delivered and the bonds issued, and under the other the bonds held by the complainants and others were negotiated. Messrs. Bacot and Ward built the company's works under a contract made by them with it, and the bonds now held by the complainants are twenty-four of forty-eight which, on the 5th of December, 1874, were given to and accepted by Bacot and Ward on account of the contract.

It is quite obvious that Bacot and Ward, having sold and given currency to them, are therefore estopped from denying the legal validity of the bonds or the legality of the lien of the mortgage by which they declare on their face that they are secured. Moreover, they bought the property at the receiver's sale expressly subject to the mortgage, and it is proved that but for that fact the sale would not have been confirmed, in view of the comparative insignificance of the price, which otherwise would have been grossly inadequate. And although the statement was made at the sale that the validity of the mortgage would be disputed, the property was, nevertheless, sold subject to the mortgage and a consequent liability to pay the full amount thereof. It is quite clear that the corporation by which the bonds and mortgage were given would be estopped from denying the validity of those instruments and the lien which the mortgage purports to create, on any of the grounds taken by the defence. *Galveston R. R. Co. v. Cowdrey, 11 Wall. 459.* And

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those defences are not available to the re-organized company, for it got and could get from Messrs. Bacot and Ward only what they obtained by the deed from the receiver and no more; that is, the company's interest in the property, subject to all legal claims and encumbrances and all equities. And it may be added that it does not occupy even the position of a purchaser for value, for it gave only its stock and bonds for the property. And Messrs. Bacot and Ward evidently own all of the stock except the few shares which they have transferred, probably without consideration, to the persons who aided them in the re-organization. It does not, in fact, appear, it may be observed, that the company was not duly organized, nor that the person by whom the mortgage was executed as president was not such officer, nor that the whole of the capital stock was not subscribed and paid in; and it does appear that the execution of the mortgage was duly authorized and that it was duly proved. The property mortgaged was valued by Mr. Bacot, in 1879, at \$82,508.80, and the bonds at par amounted to only \$66,500. If the allegation of the defence is true, that there were only about \$1,700 of the capital stock paid in, it would seem quite probable that the mortgaged premises were in part paid for with the proceeds of the bonds. So far as the property of the company is concerned, it had power, without legislative authority, to mortgage it to secure the payment of its debts. And as to its franchises, it had positive legislative authority to mortgage them, with a limitation (which the answering defendants allege it did not observe) as to the extent to which it should use the power. The equities are all with the complainants. There will be a decree for foreclosure and sale of the mortgaged premises. It appears by the testimony of Mr. Ward that he and Mr. Bacot have obtained control of about seventy-two per cent. of the bonds and have guaranteed the re-organized company against any claims under them. The complainants and the trustee are entitled to their costs, to be paid out of the proceeds of the sale of the mortgaged premises.



Rigg v. Hancock.

EDWARD RIGG et ux. et al.

v.

SAMUEL E. HANCOCK et ux.

A watercourse ran through complainant's land, then through defendant's land and was discharged upon another part of complainant's land below. A bill was filed to restrain the defendant from obstructing the watercourse on his land, and thereby diverting the stream, so that its volume was increased, and threatened to injure complainant's mill by backwater. The injunction was denied on the weight of testimony, which showed, however, that the defendant had obstructed the flow of the water at certain points outside of the place on defendant's land where complainant alleged the watercourse was located.—*Held*, that complainant was not, under the general prayer for relief, entitled to an injunction restraining defendant's obstruction of the flowage on his land outside of the place where it is alleged the watercourse is.

Bill for relief. Motion for an injunction. On order to show cause. On bill and affidavits on both sides.

Mr. Frederick Voorhees, for the motion.

Mr. A. Flanders, for defendants.

THE CHANCELLOR.

The bill alleges that the defendant, Samuel E. Hancock, has completely and permanently obstructed that part of an ancient watercourse which ran through his land, the upper part of it being on the complainants' land, so that the water which previously ran through and was discharged by it, now runs, part of it in a new channel, across another part of the defendants' land, and is discharged into the complainants' mill stream below their mill, to the threatened injury of the mill by increasing the volume of water and backing it on the wheel, and the rest of it is scattered over their meadow land. The bill prays a mandatory injunction to compel Hancock to undo his work. The very ex-

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istence of the alleged watercourse on the defendants' land is denied by affidavits on their part, which appear to be entitled to weight. The injunction, therefore, must be denied. There is evidence, however, by those affidavits, that part of the water from the watercourse on the complainants' land was for many years, and up to the time of the obstruction complained of, discharged by spreading over the defendants' land in a different place from that in which the complainants say the watercourse was, and it is urged by the complainants' counsel that if the court refuses to grant the injunction prayed for, it should, under the prayer for general relief, grant one compelling Hancock to remove the obstruction to such flow over his land. It appears that he obstructed it. The bill, however, is not framed with a view to such relief. It is wholly based on the alleged injury to the watercourse on the defendants' land. The order to show cause will be discharged, with costs.

NELSON J. H. EDGE

v.

THOMAS GOULARD et al.

Two mortgages on land were given, one in 1868 and the other in 1869. In 1870 the owner of the fee conveyed a strip of the premises to Mrs. James for a party wall, which strip Mrs. James conveyed to complainant in 1877. In 1878 the owner of the fee conveyed another strip of the premises to complainant for the same purpose, and also the rear of the premises. None of these conveyances were made subject to the two mortgages. In 1874, the owner of the fee conveyed all the rest of the premises to Mrs. Goulard, who thereby assumed the payment of both of the mortgages as part of the purchase-money. In 1880, Mrs. Goulard and her husband entered into an agreement with the holders of the two mortgages, that the holder of the first mortgage, Mrs. Gordon, should foreclose it, making the holder of the second mortgage and the complainant, and the Goulards, defendants thereto, and that Mr. Goulard should buy in the premises at the foreclosure sale, for a nominal

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price, and then pay off both mortgages, the Goulards' object being to obtain title to complainant's part of the premises without paying any consideration therefor. The agreement was carried out, and Goulard bought the premises for \$3,500, and paid off both mortgages, subsequently giving a new mortgage on all the premises, except the party-wall strip, to Mrs. Gordon.—*Held*, that a demurrer for want of equity would be overruled, because complainant's remedy at law on the covenants in his deed for the party-wall strip was inadequate, for the wall of his own house is built into the defendants, and a foundation for an independent wall cannot be laid there without piling, the driving of which the defendant's house prevents; and, also, because the foreclosure proceedings were fraudulent and collusive, and an abuse of the process of the court, and the fact that Goulard paid more than a nominal price at the foreclosure sale makes no difference; and, also, because the charges of the bill implicate Mrs. Gordon in the sham foreclosure, and raise an equity against her.

Bill for relief. On general demurrer by all the defendants.

Mr. Flavel McGee, for demurrant.

Mr. J. Garrick, for complainant.

THE CHANCELLOR.

This suit is brought to obtain relief against fraudulent foreclosure proceedings in this court. The bill states the following facts:

On the 30th of April, 1868, Abby A. McLaughlin, being the owner of certain land in Jersey City, gave a mortgage for

NOTE.—Bringing a fictitious action is a contempt of court, and it will be struck off of the docket, *Brewster v. Kitchin*, Comb. 425; *Coxe v. Phillips*, Lee temp. Hardw. 237; *Elsam's Case*, 3 B. & C. 597; *Wright v. Mason*, 8 Mod. 109; *Ryerson v. Eldred*, 23 Mich. 537; *Loughead v. Bartholomew*, Wright 90; *Brewington v. Lowe*, 1 Ind. 21; *Smith v. Brown*, 3 Tex. 360; *Smith v. Junction R. R. Co.*, 29 Ind. 546; see *Cook v. Chapman*, 3 Stew. Eq. 114; so, where there is no real dispute between the parties to the record, *Lord v. Veazie*, 8 How. (U. S.) 251; *Cleveland v. Chamberlain*, 1 Black 419; see *Farmers Trust Co. v. Green Bay R. R. Co.*, 6 Fed. Rep. 112; or a suit is brought nominally for the protection of a corporation, but in reality to compel its officers to settle their individual liabilities, *Erie R. R. Co. v. Vanderbilt*, 5 Hun 123; or the plaintiff has withdrawn from the suit, *Ryan v. Tomlinson*, 31 Cal. 11; or appears both as plaintiff and defendant, *Ransom v. Geer*, 3 Stew. Eq. 249; *Pear-*

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\$2,400 thereon to Washington B. Williams, esq., master in chancery. Mr. Williams, on the 26th of April, 1871, assigned the mortgage to Letitia Gordon, executrix. In August, 1868, Mrs. McLaughlin died. By her will she gave all her property to her daughter Margaret. The latter, May 1st, 1869, gave a mortgage for \$4,000, on the same property, to Mr. Williams as master, and he assigned it in July following to Jesse Paulmier, executor, who, the same day, assigned it to the Jersey City Insurance Company. On the 5th of January, 1870, Margaret McLaughlin, for the consideration of \$300, conveyed to Mrs. Martha M. James, for use as a party wall, a strip of land on the southerly side of the mortgaged premises four inches wide by thirty-six feet in depth, together with so much of the wall of the house on the mortgaged premises as was on that strip; and in April, 1877, Mrs. James conveyed it to the complainant. In March, 1878, Margaret McLaughlin conveyed to the complainant two other parts of the mortgaged premises, one being the rear thereof, and the other a continuation of the before-mentioned strip of four inches in width from the westerly end of the strip to the rear land just mentioned. In October, 1874, she conveyed to the defendant, Catharine Goulard, all of the mortgaged premises except the parts before mentioned, the strip previously conveyed to Mrs. James, and the parts subsequently conveyed to the complainant. The consideration of the deed to her was \$11,500, and she assumed the payment of the two mortgages as so much of the purchase-money. About the 1st

son v. Nesbit, 1 Dev. 315; *Black v. Shreve*, 3 Hal. Ch. 457; *McElhanon v. McElhanon*, 63 Ill. 457; so, where either party is fictitious, or dead, *Scott v. John*, 15 Ala. 566; or a party's name is used without his knowledge or consent, *Butterworth v. Stagg*, 2 Johns. Cas. 291; *Dussaume v. Burnett*, 5 Iowa 97; *Manchester Bank v. Fellows*, 28 N. H. 302; *Titterton v. Osborne*, 1 Dick. 350; see *Dundas v. Dutens*, 1 Ves. 196; *Giles v. Halbert*, 12 N. Y. 32; *Jobbitt v. Giles*, 22 Hun 274; *Craig v. Twomey*, 14 Gray 486; *Archer v. Frowde*, 1 Stra. 304; *Johnson v. Thompson*, 28 Ill. 352; or where the defendant's name is unknown, *Morgan v. Thrift*, 2 Cal. 562; so, if an attorney's or solicitor's name be signed to the writ without his authority, *Oppenheim v. Harrison*, 1 Burr. 20; *Yates's Case*, 4 Johns. 317. See *Williams v. Douglass*, 5 Beav. 82; *Pope v. Leonard*, 115 Mass. 286; *Partridge v. Jackson*, 2 Edw. Ch. 520.—REP.

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of January, 1880, she and her husband, the defendant, Thomas Goulard, entered into an agreement with the holder of the mortgages, that Mrs. Gordon, the holder of the first mortgage, should bring a suit for the foreclosure of her mortgage, and make the holder of the other and the complainant parties thereto, and that the whole of the mortgaged premises should, at the sale thereunder, be purchased by Mr. Goulard at a nominal price, and, after such purchase, he and his wife should pay off the mortgages. Both Goulard and his wife were then solvent and able to pay off the mortgages, but their object in procuring the foreclosure was to enable them thereby to obtain title to the complainant's part of the mortgaged premises without paying any consideration therefor. The suit was brought accordingly, and, at the sale, the property was bought in, in behalf of Goulard, by the solicitor of the complainants in the foreclosure suit, for \$3,500, and Goulard obtained a deed from the sheriff therefor accordingly, and at or about the same time he and his wife paid off the mortgages, but did not cancel them of record. The sheriff's deed was given on or about the 8th of July 1880, and on the 15th of the same month, Goulard and his wife gave a new mortgage to Mrs. Gordon, on the part of the mortgaged premises conveyed to Mrs. Goulard by Margaret McLaughlin, and the complainant's land before mentioned on the rear of the mortgaged premises. The complainant did not learn of the existence of the agreement above mentioned between the Goulards and the mortgagees, or that the property had been bought in for Goulard, until after the execution and delivery of the sheriff's deed. The complainant has no adequate remedy at law by suit on the covenants in his deeds for the loss of the land on which the wall stands, because the beams of his house (which has been built for eight years) are, at one end, supported by the party wall, and he cannot build a new wall, for it must, on account of the nature of the land, be supported on piles, the driving of which Goulard's house renders impossible. Neither the deed to Mrs. James nor that to the complainant from Margaret McLaughlin, conveys the land subject to the mortgages, or either of them, or any part thereof.

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The bill prays relief as against the Goulards and Mrs. Gordon. It alleges that the latter had full notice of the complainant's equity when she took her mortgage from the Goulards.

On the foregoing facts, there can be no doubt of the complainant's right to the relief which he seeks. The Goulards, according to the statements of the bill, conspired with the mortgagees to deprive, by means of foreclosure proceedings, which were not only collusive, but a mere sham, the complainant of his property merely for the benefit of the Goulards, and they accomplished the purpose. The collection of the money due on the mortgages was no part of the object of those proceedings, for it was agreed that the property should be struck off at the sheriff's sale to Goulard, as the pretended purchaser thereof, at a nominal price, and that he and his wife should then pay off the mortgages. Mrs. Goulard, having assumed the payment of the mortgages in the conveyance by Margaret McLaughlin to her, was, by virtue of her assumption, bound in equity to protect the complainant, as the grantee of Margaret McLaughlin of part of the mortgaged premises, at least to the extent of the value of Mrs. Goulard's land. In the proceedings for foreclosure he could have required the mortgagees, if it would not have been prejudicial to their interest to do so, to have recourse to her land before selling his to pay the mortgages. Though had the proceedings been *bona fide*, the complainant would, under the circumstances, now have no recourse to the Goulards; on the other hand, seeing that those proceedings were the very reverse, he has lost no rights by them. Obviously, equity, which relieves against fraud even in judgments at law, will not be slow to relieve against it when perpetrated by means of its own proceedings. The fact that the property was struck off at \$3,500, instead of a price merely nominal, evidently will not affect the right to relief if, as the bill alleges, the foreclosure proceedings were merely colorable. The bill states that Mrs. Gordon not only had notice of the complainant's rights in the premises, but was a party to the combination to deprive him of his property. Her mortgage was paid off by the Goulards after the sheriff's sale, and she

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took a new one on all the property except the strip, on part of which the party wall is. The complainant insists that, under the circumstances, his property should be relieved from that mortgage. The bill has equity as against her. The demurrer will be overruled, with costs.

ABRAM H. BALDWIN

v.

JENNIE M. FLAGG and husband.

A mortgage was given by a married woman, on her own lands, to secure the payment of \$11,000, representing, partly, moneys due the mortgagee, a stock-broker, for losses theretofore incurred by the mortgagor's husband; partly, similar losses incurred on the mortgagor's own account, and partly, to secure any further advances, not exceeding \$4,000, which the mortgagee might make on account of subsequent stock speculations of the mortgagor through the mortgagee.—*Held*,

(1) That the mortgage was a valid security for so much of the consideration as represented the husband's debt to the mortgagee.

(2) That it was also valid for so much as represented the mortgagee's losses incurred in *bona fide* purchases or sales of stock by the mortgagee for account of the mortgagor, and at her request, including commissions, interest and premiums for money used in carrying her stock.

(3) That a stipulation by the mortgagee that he would not "assign or dispose of the mortgage until his future advances, amounting to \$4,000, had actually been made," would not prevent his foreclosure of the mortgage for the sum actually advanced and due thereon, although such advances did not amount to \$4,000.

On bill to foreclose. On final hearing on pleadings and proofs.

Mr. H. A. Root, of New York, and *Mr. C. Parker*, for complainant.

Mr. A. Q. Keasbey, for defendants.

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THE CHANCELLOR.

The bill is filed to foreclose a mortgage dated August 26th, 1880, given by the defendants to the complainant, on land in Summit township, in Union county, and made to secure the payment of a bond of the same date given by the defendants to the complainant, in the penalty of \$23,126.88, and conditioned for the payment of \$11,563.44 and interest, on demand. The mortgage recites that the defendants were, at the date thereof, justly indebted to the complainant in the sum of \$11,563.44, mentioned in the condition of the bond; that its payment was secured by the bond, and that of that sum \$7,563.44 were due from the defendants to the complainant, and the balance, \$4,000, was security for future advances. The title to the mortgaged premises was, when the mortgage was given, and still is, in Mrs. Flagg, and she alone has answered. By the answer she admits the giving of the bond and mortgage, and sets up several defences. One is that the bond and mortgage were in fact executed by her, at the solicitation of her husband, for his accommodation and as surety for him, and that all the promises and covenants contained in them were promises to pay his debts and to answer for his defaults and liabilities, and were, as she insists, consequently invalid and created no lawful obligation against her, under the laws of this state, where she resided when these instruments were made and where the mortgaged premises are.

NOTE.—In the following cases it has been held that the broker could not recover from his principal “differences” on stock-jobbing operations: *Green’s Case*, 7 Biss. 338; *Grizewood v. Blane*, 11 C. B. 526; *Lery v. Loeb*, 85 N. Y. 365; *Gregory v. Wendell*, 39 Mich. 337; *Bryan v. Lewis, Ry. & Moo.* 386; *Godman v. Meixsel*, 65 Ind. 32.

In the following cases it was held that the broker could recover: *Rumsey v. Berry*, 65 Me. 570; *Warren v. Hewitt*, 45 Ga. 501; *Hatch v. Douglas*, 48 Conn. 116; *Pidgeon v. Burslem*, 3 Exch. 465; *Woods v. Merrill*, 57 Cal. 435; *Story v. Salomon*, 6 Daly 531, 71 N. Y. 420; *Wynkoop v. Seal*, 64 Pa. St. 361; *Brown v. Speyers*, 20 Gratt. 296; *Smith v. Bouvier*, 70 Pa. St. 325; *Young’s Case*, 6 Biss. 53; *Appleman v. Fisher*, 34 Md. 540; *Durant v. Burt*, 98 Mass. 161; *Thacker v. Hardy*, L. R. (4 Q. B. Div.) 685, 18 Am. Law Reg. (N. S.) 258, note; see *Oldershaw v. Knowles*, 101 Ill. 117.

If the original contracts were void on account of illegality, securities given to the broker for the payment of moneys advanced by him to pay losses result-

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Another defence is that as to \$3,193.01 of the \$7,563.44 mentioned in the mortgage, they were for the amount of alleged losses incurred by her husband in two partnership stock speculations, in one of which he and the complainant (the latter acting as broker as well as being partner in both) were jointly interested, and in the other he and one D. M. Ripley, the complainant's confidential agent, and the complainant were the parties in interest, and that she never intended, as the complainant well knew, that the mortgage should cover those losses which occurred in transactions in which she had no interest and of which, as she alleges, she had no information. A third defence is that the bond and mortgage were obtained from her husband on a special understanding to the effect that the complainant, who is and was a resident of the city of New York, and a stock broker carrying on the business of buying and selling stocks and other securities on commission, at the New York Stock Exchange, should, on the order of her husband, buy and sell stocks and other securities in a speculative stock account which the complainant had, previously to the giving of the bond and mortgage, been carrying on as a stock-broker for him; and that the complainant should in no case claim more than the difference arising out of such purchases and sales; that is to say, that the complainant, in consideration of brokerage commissions on purchases and sales, and interest on money furnished by him to carry the stock and securities bought, should buy and sell stocks and other securities for the speculative account, on the orders of

ing therefrom, are not void but enforceable, *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannay*, 3 T. R. 418; *Jessop v. Lutwyche*, 10 Exch. 614; *Knight v. Cambers*, 15 C. B. 562; *Rosewame v. Billing*, 15 C. B. (N. S.) 316; *Beeston v. Beeston*, L. R. (1 Exch. Div.) 13; *Pyke's Case*, L. R. (8 Ch. Div.) 754; *Clark v. Foss*, 7 Biss. 540; *Owen v. Davis*, 1 Bail. 315; *Marshall v. Thruston*, 3 Lea 740; *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243; *Jackson v. Foote*, 12 Fed. Rep. 37; *Kingsbury v. Suit*, 66 N. C. 601; *Williams v. Carr*, 80 N. C. 294; *Poorman v. Mills*, 39 Cal. 345; *Brothers v. Strassberger*, 2 Woods 554; *Jones v. Sevier*, 1 Litt. 50; *Greathouse v. Throckmorton*, 7 J. J. Marsh. 16; *Williams v. Tiedemann*, 6 Mo. App. 269; but see *Barnard v. Backhaus*, 52 Wis. 593; *Pauls v. Gunn*, 4 Bing. N. C. 445; *Fareira v. Gabell*, 89 Pa. St. 89; *Cannan v. Bryce*, 3 B. & Ald. 179.

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Mr. Flagg, upon the condition and with the special provision and agreement that in no case was Mrs. Flagg, as nominal principal, or her husband, as the real principal, to be under any obligation to take delivery or transfer of any of the stock or securities, and when the differences between the purchases and sales were favorable to the account it should be credited therewith, and whenever the complainant advanced money to pay differences on purchases and sales which showed a loss, the amount of the differences should be charged against the account, the complainant agreeing, in consideration of receiving the security of the bond and mortgage and the commissions and interest, to make purchases and sales on speculation on the account, in accordance with Mr. Flagg's orders, until he should have advanced, over and above the profit, differences to be credited to the account, for differences, losses, cash drafts, commissions and interest, the whole amount of the bond and mortgage; and no part of the amount of the bond and mortgage was to be due or payable at any time during the progress of the speculations, unless the amount of the complainant's advances, to cover differences, losses, drafts, commissions and interest, should equal the amount of the bond and mortgage, over and above all profit differences. Mrs. Flagg insists that this was a wagering contract and therefore illegal and void, and that hence the payment of the bond and mortgage cannot be enforced. Still another defence is that this suit was prematurely brought, inasmuch as, as she insists, the complainant, having agreed to make advances

See, further, the following articles and annotated cases: 1 *Cent. L. J.* 200; 7 *Id.* 41; 10 *Id.* 221, 241; 3 *Crim. Law Mag.* 1; *Melchert v. Am. Union Tel. Co.*, 11 *Fed. Rep.* 193, 201, note; *Van Horn v. Gilbough* (Pa.), 21 *Am. Law. Reg.* (N. S.) 176, note.

If a profit had been made on the transaction, the broker could have been compelled to pay it over to his principal, *Warren v. Hewitt*, 45 Ga. 507, and cases cited; *Brooks v. Martin*, 2 Wall. 70; *Pointer v. Smith*, 7 Heisk. 137; *Bonsfield v. Wilson*, 16 M. & W. 185; *Daniels v. Barney*, 22 Ind. 207, 32 Ind. 19; *Murray v. Vanderbilt*, 39 Barb. 140; *United States Ex. Co. v. Lucas*, 36 Ind. 361; *Wilson v. Owen*, 30 Mich. 474; see *Heckman v. Swartz*, 50 Wis. 270; *Jenkins v. Power*, 6 M. & S. 282; *Jones v. Taylor*, 2 Pugs. (N. B.) 391; *Pfeuffer v. Maltby*, 54 Tex. 454.—REP.

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to the amount of \$4,000, did not perform his agreement, but refused to make advances and buy and sell stocks or other securities for her husband, while as yet the difference in the account in the complainant's favor did not amount to the \$4,000; and she insists that the mortgage is not due or payable until advances to that amount shall have been made. Another defence is that the complainant has made illegal charges for interest and commissions.

The history of the transactions involved is as follows: Flagg opened an account with the complainant January 28th, 1880, and bought and sold stocks on it, on his own account, up to the time when he began to make such sales and purchases in the name and for the account of his wife, which was June 15th, 1880. He was interested also as partner in the two accounts before mentioned. One (called the Flagg and Baldwin account), of himself and the complainant, began May 6th, 1880, and closed on the 13th day of July following. The other (called the Flagg and Ripley account), of himself and Ripley and the complainant, began May 21st, 1880, and was closed on the 7th of June following. On the 15th of June, 1880, Mrs. Flagg wrote the complainant a letter, enclosing therein her note for \$4,500, in which she said she sent the note as margin in a speculation stock account, which she wished to open with him, and requested him to transfer to her name the personal account of her husband on his books, and to follow the latter's directions in all matters connected with her account. The account was continued, and the transactions conducted accordingly in her name and for her account, under the control and direction of her husband, until August following, when the complainant, in view of the losses which had been incurred, was unwilling to go further without further security than was afforded by the note. The bond and mortgage were then given. As before stated, they are dated August 26th, 1880. By her letter of that date to the complainant, Mrs. Flagg acknowledges the receipt from him of a statement showing the condition of her account, from which it appeared that at that day's prices she was indebted to him in the sum of \$4,370.43, and she acknowledged the correctness of the

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statement and agreed that it should be an account stated. She also thereby ratified and confirmed everything her husband had done, with or through the complainant, for her. She also, by that letter, authorized and empowered her husband to act for her in the future as her agent and attorney, in the control and management of her account with the complainant, and in the purchase and sale, by and through him, of any and all stocks, bonds and other securities, and agreed to ratify and confirm and adopt, as her own, every such transaction. Her husband, by another letter of the same date to the complainant, acknowledged that he had received a statement of the joint accounts before mentioned, that it was correct, and that there were due to the complainant from him on the one (Flagg and Baldwin's) \$2,863.05, and on the other (Flagg and Ripley's) \$329.96 (altogether \$3,193.01), and agreed that the statement should be an account stated. By letter of the same date to Mr. and Mrs. Flagg, the complainant acknowledged the receipt of the bond and mortgage, and stated that of the \$11,563.44 which it was made to secure, \$7,563.44 were for the amount of their indebtedness to him, and that the rest, \$4,000, was to cover future advances. And he thereby agreed that he would not assign or dispose of the bond and mortgage before the \$4,000 of future advances had been made; and added that those advances were to be charged to the personal account of Mrs. Flagg only, and that no future losses in the joint accounts before mentioned were to be considered as part of the \$4,000 of advances; and that it was understood and agreed that he should have the sole and absolute control of those joint accounts, and that all orders given by Mrs. Flagg, or by Mr. Flagg for her, after that date, were to be charged to her personal account. The whole sum mentioned in the mortgage, \$11,563.44, was credited to Mrs. Flagg in her account under date of November 4th, 1880. The account continued until March, 1881. On the 14th of that month the complainant demanded of Mrs. Flagg the payment of \$2,975.07, as the amount due him on her account (the amount of the mortgage had, as before stated, been credited), and notified her that on payment of that sum he would deliver to her order one hundred shares of the

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first preferred stock of the Chesapeake and Ohio Railroad Company, then in his office, and standing to the credit of her account, and that on failure to pay the money demanded he would sell the stock at auction on the 16th of March. The money not being paid, the stock was sold accordingly, and the sale produced such a sum of money, as that when it was credited to Mrs. Flagg there was a balance of account in her favor (crediting the mortgage) of \$653.93. The difference, \$10,909.51, between the amount of the mortgage and that sum, is the amount which, with interest thereon from March 17th, 1881, is claimed to be due on the mortgage. The note for \$4,500 has been given up to Mrs. Flagg.

The first of the defences, as they are above stated, is that Mrs. Flagg executed the bond and mortgage merely as security for her husband. This defence must have reference to his share of the losses on the joint accounts, for the other indebtedness was her own, and the advances were to be made not for him, but for her.

It is enough to say on this head, that it is established in this state that a mortgage made by a married woman on her own property, to secure the debt of her husband, is valid. *Campbell v. Tompkins*, 5 Stew. Eq. 170, affirmed on appeal, 6 Stew. Eq. 362. That Mr. and Mrs. Flagg were, when the mortgage was given, indebted to the complainant in the sum mentioned in the mortgage in that behalf, \$7,563.44, is proved clearly. By his letter of the same date as the mortgage, Flagg acknowledged that he owed the complainant \$3,193.01, and Mrs. Flagg, by her letter of that date, acknowledged that she, herself, owed him on her own account \$4,370.43, which two sums together make the amount, \$7,563.44, mentioned in the mortgage as being then due from both of them. It appears, by the complainant's letter to them of the same date, that it was understood that no future losses in the joint accounts called the Flagg and Baldwin and Flagg and Ripley accounts, should be considered any part of the \$4,000 advances to be made. The three letters just referred to were all part of the same transaction, and were written and signed to witness the matters stated in them. It appears from

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them that Flagg's share of the losses on the joint accounts was understood to be secured by the bond, but that future losses by him on those accounts, or either of them, were not to be. Mrs. Flagg is bound by the statements of those instruments. Moreover, Flagg testifies that he told her that the mortgage was given to secure the losses incurred in the joint accounts. It may be observed that she was not defrauded by the complainant in the matter in any way, and her husband, who acted for her, is a lawyer, and had then been practicing in New York as such for many years. He testifies also that he is an expert (and he has given his evidence in this suit as such in her behalf) in the matter of stock transactions in Wall street, as conducted at the present day, having made them, as he says, a study as a lawyer, and having, when the mortgage was given, been conversant with them practically for four or five years.

There seems to have been no attempt to sustain the allegation that the complainant has made illegal charges for commissions, and it appears by his testimony, which is uncontradicted on the point, that he has charged for interest only what he paid. There was a full understanding between him and Mrs. Flagg on the subject of the charges to be made for interest. By her letter to him of January 20th, 1881, she expressly authorized him to charge to her account the interest and commissions he might pay for money used to carry whatever stock he then had or should thereafter have for her, at such rates as he should pay therefor, and she thereby agreed to pay him such interest, including the premium he should pay for the money above legal interest. The complainant swears that he charged only what he paid, and that he finds but two charges for extra interest in the accounts—one of \$23.75, in Mr. Flagg's account, under date of April 9th, 1880, and the other of \$111.42, in Mrs. Flagg's account, under date of February 28th, 1881.

To consider the defence made on the ground that the transactions as indemnity, in which the mortgage was given, were illegal. Part of the money secured was, as already stated, the amount of Flagg's share of the losses in the joint accounts. The transactions in which those losses were incurred, as well as

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those on individual account, were legal. The complainant swears that every transaction in which Mr. and Mrs. Flagg were concerned, and every one in the joint accounts, was an actual *bona fide* transaction; that the stocks bought were paid for and received, and the stocks sold delivered and the checks therefor received and deposited by him in bank. And in this connection it may be stated that the Flagg and Ripley account appears to have been a speculation in one hundred shares of Western Union Telegraph Company stock, and not only is the stock entered on the account "long," but the complainant swears that he, at the request of Flagg, on beginning the account, bought it and paid for it, and carried it for the joint account. The complainant's testimony as to his purchases and sales of the stock bought and sold for the defendants, whether on one account or the other, is in itself decisive as to the legality of the transactions in question. He swears that they were all actual transactions, and not mere agreements to pay differences, that they were *bona fide* purchases and sales, and not mere wagering contracts; and he brings into court the checks given by him on the purchase of the stocks. It is urged, however, that as to the transactions for the account of the defendants alone, they were evidently, notwithstanding the testimony of the complainant concerning their character, in fact "short," and therefore mere gaming transactions; substantially wagers upon the price which the stocks would bear in the market at a future day, and that an actual sale or purchase was not contemplated in any case, but all the transactions of apparent purchase and sale were only colorable and fictitious, and therefore illegal, and within our statute against gaming. Here it may be remarked that while Mr. Flagg says that none of the transactions involved represented a real transaction in stocks, it is quite clear that he speaks merely of his own views on the subject; for he says the accounts represent what are called "long" and "short" transactions (and he explains that by "long transactions," he means those where an order is given to a broker to buy, or, in the case of these accounts, where the broker receives an order to credit the account with certain stocks), and he does not deny that the complainant in

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fact bought the stocks when he was ordered by him to do so. He says he never inquired and did not care whether the complainant bought or sold on the stock exchange in accordance with his orders or not. He speaks of the intention of the parties, and not as to what was in fact done; and so far as he speaks of the complainant's intentions on the subject, he is contradicted by the latter. A "short" sale of stock is a sale before purchase, usually with a view of purchasing at a future time, at a lower price, for delivery. The *modus operandi* of such a sale through a broker is as follows: On receipt of the order to sell short from the customer, the broker sells the stock and notifies the customer of the sale, giving him the name of the purchaser. When the time for delivery arrives, he delivers the stock, but in the interest of and for the customer (since the latter sold the stock without owning it), borrows it to deliver, giving his check for it (he pays for the use of the stock for the transaction), and delivers the stock to the buyer, and receives the money for it. If, to replace the stock borrowed, a loss is met, it is, of course, the customer's loss, and the broker looks to the "margin" in his hands for indemnity in that regard, as well as for his commissions &c. So that there is, in every such transaction, provision for an actual delivery of the stock. Such transactions have, in actions by and against the brokers, been held to be legal both in New York and elsewhere. *Knowlton v. Fitch*, 52 N. Y. 288; *White v. Smith*, 54 N. Y. 522; *Smith v. Bouvier*, 70 Pa. St. 325; *Thacker v. Hardy*, L. R. (4 Q. B. D.) 685; *Ex parte Rogers*, L. R. (15 Ch. D.) 207; *Maxton v. Gheen*, 75 Pa. St. 166; and see, also, *Lehman v. Strassberger*, 2 Woods C. C. 554, and *Bigelow v. Benedict*, 70 N. Y. 202.

In the transactions now under consideration the complainant was acting as a broker and not at all as a principal. The speculations were not his but Mrs. Flagg's. The gain and the loss were hers, not his. On her order and for her he actually bought stocks and became responsible to the seller for the value thereof, and looked to her for the indemnity to which, under the circumstances, he, as an agent, obviously was entitled from his principal. Not only is *bona fide* dealing in stocks lawful in New

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York, but it is lawful here and elsewhere. Where the broker buys or sells the stock in fact, the transaction is, so far as he is concerned, legitimate, whether his principal takes or intends to take the stock ultimately or not. It is otherwise, however, of course, where he is the agent of his customer in making agreements which are mere bets on the market value of stock at a future day, and which, therefore, neither involve nor contemplate any purchase or sale. To treat the broker as a principal in either case would be contrary to the facts, but while, in the latter case, he is of course chargeable with the knowledge that the transaction is a mere illegal, wagering contract which the law will not countenance, and in respect to which and his dealings therein it will give him no aid, in the former, his own action being a matter of legitimate business, he is not responsible either for the intention or future action of his principal in the premises, and cannot be affected thereby.

To dispose of the remaining defence, that this suit is prematurely brought: This is based on the claim that the complainant not only agreed to advance the \$4,000 (which it is insisted he has not done), but agreed also that he would not take any steps to enforce payment of any of the money which the mortgage was given to secure until he had done so. The agreement between the parties on those heads is to be found in the bond and mortgage, the complainant's letter of the same date (August 26th, 1880), and his "stipulation" of March 10th, 1881, in a suit brought by Mrs. Flagg against him, in that month, in the court of common pleas of the city of New York, for the surrender to her of the bond and mortgage and the note of \$4,500. The stipulation, however, does not differ in any way from the agreement which the letter evidences. The language is substantially the same. The parol testimony offered by the defendants to prove that the complainant, before the mortgage was given, agreed that in consideration of the giving of it he would advance the \$4,000, is not competent. The complainant, however, swears that there was no agreement or understanding of any kind on the subject except that shown by his letter, which was merely that he would not "assign or dispose of the bond

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and mortgage before the \$4,000 of future advances had been made." And it is noticeable that the stipulation drawn after litigation between these parties had commenced, is not that the complainant will not seek to enforce the payment of the money which he claims is due on the bond and mortgage, but that he will not "assign or dispose of" those instruments until the sum of \$4,000 of future advances has "actually been made."

What the agreement was, is evidenced by the language of the letter and stipulation. It was that the complainant would not part with the ownership of the bond and mortgage until after the whole of the \$4,000 had been advanced. The defendants' object in obtaining the agreement is plain. It was to keep the bond and mortgage in the complainant's hands, and out of those of strangers, to give the defendants opportunity to redeem them by means of their speculations through the complainant until the \$4,000 were all gone. The agreement did not bind the complainant to advance any money at all, and its language cannot be held to imply an agreement that he would do so, or that he would not take any steps to enforce payment until after he had advanced the whole of the \$4,000. Not only is there no necessary implication to that effect, but it would not be a reasonable inference. Had the parties intended to provide that there should be no enforcement of payment unless the whole amount had been advanced, they would have done so. Mr. Flagg, it must be remembered, is a lawyer. The complainant would have been at liberty to enforce payment of the \$7,563.44 and interest, if he had not advanced any money at all. Where a mortgage is given to secure future advances by the mortgagee, and he stipulates that he will make advances to a certain amount, and he makes advances, but not to the stipulated amount, he may enforce his claim for repayment by foreclosure for any amount he may have advanced. *Dart v. McAdam*, 27 Barb. 187; *Coleman v. Gabbreath*, 53 Miss. 303; *Robinson v. Cromelein*, 15 Mich. 316. The case of *Maryott v. Renton*, 6 C. E. Gr. 381, cited by defendants' counsel, is not opposed to this doctrine. It merely holds that a foreclosure suit begun before the mortgage is due cannot be maintained. Though there was there an agreement

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to advance \$9,000, which had been only partly performed (the mortgagee having advanced only \$3,000, and refusing to advance any more), the decision was not put on that ground, but on the ground that the time when, according to the agreement of the parties, the mortgage was to become due had not arrived when the suit was begun. Not only was no stress laid on the fact that the mortgagee had refused to fulfill his agreement as to the amount of advances, but no reference was made to it. The facts of that case were, as appears by the opinion, as follows: Renton held two mortgages of different dates, both given by Maryott to him, on the same premises. The first one was made to secure the payment of \$6,000. When the second was given the first was past due. After the maturity of the first, and before the giving of the second mortgage, Renton agreed with Maryott to advance him \$9,000 and take a new mortgage to secure the amount of the first mortgage, and the advances he should make. To save the expense of revenue stamps the new mortgage was made to secure the advances only, and the first mortgage was let stand. The agreement was that the \$6,000 of the first mortgage was to run without interest, and not be due until the maturity of the second mortgage, which was February 1st, 1868. Renton, who, as before stated, had advanced only \$3,000 of the \$9,000 under the second mortgage, and refused to advance more, began his suit August 27th, 1867. It will be seen that the case rather supports than antagonizes the principle above enunciated. But, further, the complainant swears, and the evidence sustains his statement, that he has advanced under and on the security of the mortgage more than \$4,000. When the sale of stock was made by him, pursuant to notice on the 18th of March, 1881, there was a balance of about \$3,000 due him on the account after crediting the amount of the mortgage, that is, after crediting the whole of the \$4,000. So that there was then due to him from Mrs. Flagg, for advances and commissions and interest since the giving of the mortgage, about \$7,000. The proceeds of the sale were \$3,629. Applying them to the account, there remain due to the complainant \$10,909.51, for which, with interest from March 17th, 1881, he is entitled to a decree.

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THE RAHWAY SAVINGS INSTITUTION

v.

THE IRVING STREET BAPTIST CHURCH, OF RAHWAY.

A portable iron furnace for heating a church, standing on the cellar floor, and held in position by its own weight, and capable of being detached, and also its pipes &c., without injury to the building, is not, as between mortgagor and mortgagee, a fixture.

Bill to foreclose. On motion for order requiring defendants to replace a furnace, with its attaching pipes and registers, removed from the mortgaged premises since the commencement of the suit.

Mr. J. Henry Stone, for the motion.

Mr. T. H. Shafer, contra.

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The question presented for decision is whether the furnace removed by the defendants from the church edifice on the mortgaged premises is to be regarded as part of the real estate or not.

NOTE.—“A lessee made a furnace for the use of a dyer and fixed it to the wall of his house, and the lessee, being condemned in debt, the sheriff came to the furnace, and put his hands upon it and delivered it to the defendant; and the lessee brought trespass. *Glanvil*: ‘A furnace may be delivered in execution and the house never the worse; * * * it is not waste to take away a furnace.’ *Beaumont*: ‘It is doubly fixt to the land and to the wall, and it is clear that the sheriff cannot take it from the wall.’ *Dyer*: ‘The diversity is when the furnace is fixt to the middle of the house, and when to the wall, for the termor may take it from the middle of the house, but not from the wall.’ And to this *Owen* agreed,” *Day v. Austin, Owen* 71.

“In the time of Lord Dyer this difference was here taken and agreed, that a furnace fixed *in medio domus* is but a chattel, and is removable; but otherwise it is being fixed to the walls,” *Day v. Bisbitch, Cro. Eliz.* 374.

A furnace, though fixed to the freehold and purchased with the house, shall.

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It is a portable furnace, and was placed in the cellar of the church, which was excavated as a receptacle for the stove, by which it was contemplated to warm the church, and for the storage of fuel and ashes and articles of church furniture not needed for use. For several years before the furnace was put in, the edifice was warmed by a stove or stoves placed in the cellar, the heat from which was conveyed to the audience-room, on the first floor, by registers in the floor of that room. These stoves appear to have proved insufficient for the purpose, and other means of warming the room were resorted to, which also proving unsatisfactory the furnace or heater was put in. It is not mentioned in the mortgage, but was put in a long time after the mortgage was given. It stood on the bottom of the cellar, and was not attached to the building except by the pipes attaching it to the registers and the smoke-pipe connecting it with the chimney. The smoke-pipe does not appear to have been fastened to the chimney in any way. Stoves set up in the way in which they usually are at the present day are not fixtures. *Ewell on Fixt.* 300; *Williams v. Bailey*, 3 *Dane's Abr.* 152. There are numerous adjudged cases in which stoves have been held to be fixtures, but it will be found that in all of them there was either actual annexation to the freehold or other evidence of intention to make them permanent additions thereto. In *Smith v. Heiskell*, 1 *Cranch C. C.* 99, and *Folsom v. Moore*, 19 *Me.* 252, Franklin stoves were held to be fixtures, but they were probably permanently fixed and substituted for the fire-places.

go to the executor and not to the heir, *Squier v. Mayer*, *Freem. Ch.* 249; but see 11 *Vin. Abr.* 167; and a fire engine set up for the benefit of a colliery by a tenant for life, *Lawton v. Lawton*, 3 *Atk.* 13; see *Kelsey v. Durkee*, 33 *Barb.* 410; *Bain v. Brand*, *L. R.* (1 *H. L. C.*) 762; iron backs to chimneys belong to the executor, and not to the heir, *Harvey v. Harvey*, 2 *Str.* 1141; *Leach v. Thomas*, 7 *C. & P.* 327; *Bishop v. Elliott*, 11 *Exch.* 113; ranges go to the heir, *Winn v. Ingilby*, 5 *B. & A.* 625; *Rex v. St. Dunstan*, 4 *B. & C.* 686; *Fratl v. Whittier*, 58 *Cal.* 126; and stoves and grates fixed with brickwork into the chimneys, *King v. St. Dunstan*, 4 *B. & C.* 686; *Leonard v. Stickney*, 131 *Mass.* 541.

Iron stoves fixed to the brickwork of the chimneys of a house are fixtures, and may be levied on, under execution, as part of the house, *Goddard v. Chase*, 7 *Mass.* 432; and pass to the vendee of the house, *Smith v. Heiskell*, 1 *Cranch C. C.* 99; *Folsom v. Moore*, 19 *Me.* 252; but not a mere stove, *Freeland*

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In *Blethen v. Towle*, 40 Me. 310, it was held that stoves were fixtures; but the stoves in that case were standing permanently attached in the places where they were used, and it was also held in that case that stoves not standing in their places permanently attached, but put away for the summer, were not fixtures. In *Tuttle v. Robinson*, 33 N. H. 104, it was held, as between the administrator and the heir, that a stove was a fixture, but the stove was a heavy one placed by the ancestor in a chimney having no fire-place; the stove was without legs, and set on brick work, and had a short funnel bricked around in the chimney, so as to render it doubtful whether it could be removed without disturbing the brickwork. In *Goddard v. Chase*, 7 Mass. 432, stoves were held to be fixtures; but they were cast-iron stoves fixed to the brickwork of the chimneys of the house, and it seems that they were set into the chimneys, so that it was necessary to pull down the fire-places to get them out. In *Main v. Schwarzwaelder*, 4 E. D. Smith 273, it was held that a furnace, so placed in a house that it could not be removed without disturbing the brickwork of the house adjoining the furnace, and probably not without causing a portion of the ceiling to fall, was a fixture.

In *Stockwell v. Campbell*, 39 Conn. 362, portable furnaces placed in the cellar of a house were held to be fixtures, on what ground will be seen hereafter. But in *Freeland v. Southworth*, 24 Wend. 191, it was held between vendor and vendee of land, on which there was a dwelling-house without a fire-place and

v. *Southworth*, 24 Wend. 191; see *Blethen v. Towle*, 40 Me. 310; nor a portable furnace, resting by its own weight upon the ground, although connected with the house by a cold-air box, and hot-air pipes and registers, *Towne v. Fiske*, 127 Mass. 125; *Allen v. Mooney*, 130 Mass. 155; *Heysham v. Dettre*, 89 Pa. St. 506; (contra, *Thielman v. Carr*, 75 Ill. 385); although it may be a question of fact, *Ib.*; *Turner v. Wentworth*, 119 Mass. 459; nor a portable fence, *Pennybecker v. McDougal*, 48 Cal. 160; but see *Wood's L. & T.* 877; *Ricketts v. Dorell*, 55 Ind. 470; nor boilers &c., for heating a conservatory, which rested by their own weight on bricks and were not fastened to the land, *Gardiner v. Parker*, 18 Grant's Ch. 26; see *Jenkins v. Gething*, 2 Johns. & Hem. 520.

An organ in a church built into a recess, left for and adapted to the purpose, is a fixture, *Rogers v. Crow*, 40 Mo. 91; *Chapman v. Union Ins. Co.*, 4 Bradw. 29; and a mirror so built into a house, *Mackie v. Smith*, 5 La. An. 717;

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without a chimney except from the chamber floor upwards, that a stove from which went a pipe into the lower end of the chimney was not a fixture. In the case in hand there was no such attachment of the furnace (which was in fact merely a large stove) as to indicate any intention to annex it to the freehold. It was not attached to the chimney, and the connection with the registers in the floor above it was only such as was necessary to convey the heat into the audience-room. It was not attached to the cellar bottom, nor did it even stand in a place specially adapted to receive it, as did the furnaces in *Stockwell v. Campbell*, 39 Conn. 362. That case is often cited in discussions on the law of fixtures, but an examination of the facts and opinion leads to the conclusion that its doctrine cannot be accepted as a guide. According to the report, the furnaces were portable cone furnaces, not set on brick or otherwise fastened to the house or floor, but set in pits made in the cellar bottom to receive them, and they were held in their places by their own weight. The smoke-pipes were similar to ordinary stove-pipes, and led from the furnace to the chimneys, carrying off the smoke and gas generated by the combustion of the fuel used to supply the heat, and could be detached from the chimneys and furnaces without injury to either or to the pipes themselves. The hot-air pipes were not sold with the furnaces, and were connected with them by short pieces of pipe which could be removed without injury to the hot-air pipes or the furnaces or the short pipes themselves. The furnaces could be removed and reset without difficulty, and

Lockwood v. Lockwood, 3 Redf. 330; *Ward v. Kilpatrick*, 85 N. Y. 413; but not a cupboard fitted into a recess, *Blethen v. Towle*, 40 Me. 310; nor a safe, *Moody v. Aiken*, 50 Tex. 65; but see *Folger v. Kenner*, 24 La. An. 436; *Dostal v. McCaddon*, 35 Iowa 318; nor show-cases in a store, with shelves, drawers and mirrors, and nailed to the walls, *Kimball v. Grand Lodge*, 131 Mass. 59; *Guthrie v. Jones*, 108 Mass. 191; nor a hotel sign, *Woodward v. Lazar*, 21 Cal. 448; nor a ferry-boat run by a chain fastened to the shore, *Cowart v. Cowart*, 3 Lea 57; nor settees in a church, *Chapman v. Union Ins. Co.*, 4 Bradw. 29; as to seats in a theatre, see *Grosz v. Jackson*, 6 Daly 463, 17 Alb. L. J. 479, note; or stools in a store, *Lawrence v. Kemp*, 1 Duer 363. A key, although in the lock of a door of a house, may be the subject of larceny, *Hoskins v. Tarrance*, 5 Blackf. 417; and doors taken off of the hinges by the defendant, *Willke's Case*, 34 Tex. 155.—REP.

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without any appreciable injury either to them or the house, except that if they were reset elsewhere the casings might require different apertures for the pipes and the closing up of those previously used. They could have been placed in the house after it was completed, without difficulty, and as easily as at the time they were in fact placed therein. The decision that they were fixtures seems to have been wholly based on the conclusion that the intention to make the annexation permanent was shown by the preparation of the house for their reception in the making of the pits in the bottom of the cellar, adapted to them in size and depth and for the express purpose of receiving them. Now, while it is true that it is not necessary to constitute an article a fixture that it be actually fastened to the freehold or something accessory thereto (the case of the factory-bell, *Alvord Carriage Manf. v. Gleason*, 36 Conn. 86, and the case of the windlass in the slaughter-house, *Capen v. Peckham*, 35 Conn. 88, and that of the steam-pipes on brackets in a factory, *Quinby v. Manhattan Cloth Co.*, 9 C. E. Gr. 260, are illustrations of that doctrine), it cannot be held that the mere fact that a chattel is placed in a part of a house which has been adapted to receive it, will make it a fixture; for example, a bedstead in a house obviously would not be made a fixture by the mere fact that it was placed in an alcove made to receive a bedstead. And so, too, the mere fact that a stove or portable furnace is placed in a niche made to receive a stove, or is set in a depression or pit or other place in a floor made to receive a stove or portable furnace, will not make such stove or furnace a fixture. In the case under consideration, however, there was no such evidence of intention as the court found in *Stockwell v. Campbell*. The furnace stood on the level cellar bottom, and was held in place by its own weight alone. No injury was done to the building by its removal. It appears to me quite clear that it was not a fixture. The motion is denied.

Bradley v. Johnson.

MARGARET BRADLEY

v.

JOHN E. JOHNSON et ux.

The complainant, the holder of a second mortgage on lands, applied to the husband of the holder of the first mortgage (the husband being the owner of the equity of redemption) to purchase the first mortgage. The husband named a price, on condition that the complainant would also pay him \$350 for his equity, which proposition was accepted. The husband had no authority whatever to negotiate for his wife in the matter. On bill for specific performance—*Held*,

(1) That the wife, of course, could not be compelled to assign the first mortgage.

(2) That the agreement could not be enforced against the husband by substituting for performance, indemnity against his wife's interest in the premises as a mortgagee and dowress; there being no prayer for such relief in the bill.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. R. P. Wortendyke, for complainant.

Mr. M. W. Niven, for defendants.

THE CHANCELLOR.

This suit is brought to compel specific performance of an alleged agreement stated by the bill to have been made by Mr. Johnson, assuming to act for his wife as well as for himself therein, for the sale to the complainant and Mary Johnson of a house and two lots (one vacant) in Hoboken, and the first mortgage thereon. The complainant and Mary Johnson held a second mortgage upon that part of the property on which the house is; the defendant, Mrs. Johnson, the first mortgage on both lots, and Mr. Johnson, her husband, the equity of redemption of the whole property. The complainant and Mary John-

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son set out to buy the first mortgage to protect their own, and applied, through their attorney, by letter, to the defendant, Mrs. Johnson, to learn on what terms she would sell her mortgage. The correspondence resulted in a letter from Mr. Johnson to the attorney offering to sell the mortgage for \$2,800, provided the attorney's principals would buy the equity of redemption also at the price of \$300. To this the attorney agreed, and the complainant and Mary Johnson were ready at the time and place fixed (the negotiations appear to have been all made by correspondence between Mr. Johnson and the attorney) to carry out the agreement on their part, but the defendants refused. The bill prays that the defendants may be decreed to perform that agreement, and there is also a prayer for relief generally. The defendants have answered together. They deny that Mr. Johnson had any authority to make the agreement for the sale of Mrs. Johnson's mortgage, or that she knew that he was about to make or had made it or any agreement on the subject, until she was informed thereof by him, and that she then never ratified it in any way. The proof establishes the defence. Mr. Johnson appears to have assumed to act for his wife without any warrant whatever, and without any knowledge on her part that he was doing so. He seems to have presumed (incorrectly as the sequel proved) that she would adopt his views in the business and act accordingly. The mortgage was her own, and he appears to have had no right, legal or equitable, to the control or disposition of it. Nor had he even any general agency for her in her business matters. The relief prayed must be denied and the bill dismissed, but, under the circumstances, the dismissal will be without costs.

The complainant's counsel urged, on the hearing, that if the court would not enforce the agreement as against the wife, it should do so as against the husband, and compel him to execute it, substituting indemnity for performance, so far as his wife's refusal to assign her mortgage on and to bar her dower in the property may render it necessary. There is no evidence of bad faith in the matter. Mr. Johnson appears not to have thought that by the correspondence he was entering into a binding agree-

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ment. The complainant and Mary Johnson, for their own protection as holders of the second mortgage, sought to purchase Mrs. Johnson's mortgage, and nothing more, and asked her to name her price for it. Mr. Johnson named the price, and the complainant accepted the offer. Part of the price was the sum of \$300, to go to him for the equity of redemption which he held. In one of his letters, written after his wife refused to sell her mortgage for the price he had fixed, he says to the complainant's attorney :

"As soon as my wife was advised of what had passed between us, she proceeded to Hoboken to examine into the matter, and, on consultation with friends there, she was disposed to hesitate about conveying her mortgage for less than her entire interest in it. As she has suffered several losses through me, I do not feel that I may insist upon her taking any other step in the matter. I should be willing to do my part, but that, of course, is not what your clients want."

The reply to this was a demand for the execution of the agreement by him and his wife, and a threat of proceedings in equity to compel them should they refuse. His offer to convey his interest, independently of that of his wife, appears not to have been accepted. The sale of the equity of redemption was made (and it seems to have been so understood by both sides) only in connection with the sale of the mortgage, and it was dependent on it. The complainant and Mary Johnson, as before stated, wanted to purchase the first mortgage alone, not the equity of redemption in the property, part of which was not covered by their mortgage. Mr. Johnson appears to have imposed, as a condition of selling the first mortgage to them, that they buy his interest, and when the sale of the mortgage fell through he considered the agreement for the sale of the equity of redemption of course at an end. But it is quite enough to say on this head that the bill prays no such relief, and justice, no less than correct practice, requires that if relief was to be sought against Mr. Johnson alone, substituting indemnity for performance, if necessary, the bill should have prayed it specifically. In this case

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the husband has not been called upon to litigate the claim in that respect, and therefore has not answered on that head.

In *Young v. Paul*, 2 Stock. 401, and *Peeler v. Levy*, 11 C. E. Gr. 330, cited by the complainant's counsel, there was a specific prayer for such relief. It may be remarked that the agreement was made, according to the bill, with the complainant and Mary Johnson. The latter is not a party, and no reason is given or appears why she is not.

HARRIET N. WOODBURN

v.

WILLIAM GANNON et ux. et al.

A mortgage on two lots of land contained a stipulation that the mortgagee would release the first lot from the mortgage, on the payment of \$300 on account of the mortgage, at any time before its maturity. Five months before the mortgage became due, the mortgagee credited \$1,100 on the mortgage, representing interest due thereon and moneys paid by the mortgagor, on behalf of the mortgagee, on transactions having no connection with the mortgage whatever. On foreclosure—*Held*, that the mortgagor could not claim the benefit of the stipulation so as to withdraw the first lot from the lien of the mortgage.

Bill to foreclose. On final hearing on pleadings and proofs.

Messrs. Shaffer & Durand, for complainant.

Mr. T. F. McCormick, for Gannon, mortgagor.

THE CHANCELLOR.

The mortgage in suit contains an agreement that the mortgagee will release the lot first described in the mortgage (the mortgage is on two lots of land) at any time before the maturity of the mortgage, on the payment of \$300 to her on account of

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the mortgage. The mortgage is dated November 1st, 1873, and became due November 1st, 1878. On the 1st of June, 1878, the mortgagee receipted for \$1,127, as having been paid on the mortgage. The mortgagor, by his answer, insists that by virtue of that receipt he was, under the agreement above mentioned, entitled to a release of the lot first described in the mortgage from the lien and encumbrance of the mortgage, and that, no release having been given to him, he is now entitled to the benefit of the agreement. The amount thus credited appears not to have been a payment of any money on account of the mortgage, except it may have been some interest, but was, with perhaps that exception, a voluntary reduction of the mortgage which the mortgagee, at or about the date of the receipt, made on the promise of the mortgagor to pay certain moneys which he was liable to pay in business transactions having no reference to the mortgage. They were taxes and rent due from him on property leased by her to him, and money which her husband had been, or might be, compelled to pay as surety for him, and for which a judgment had been recovered against both of them. The mortgagor himself testifies that the receipt was not given for money paid on the mortgage, except some interest. It is obvious that the voluntary reduction of the amount of the mortgage was in no sense a payment by the mortgagor. The defence set up by the answer is not sustained. There will be a decree for the complainant accordingly.

JOHN TONNELE'S TRUSTEES**v.****LAURENT J. TONNELE et al.**

A testator gave a specified part of his homestead to his son, for life, and the other part to his daughters, for life, and the residue of his estate to the son and daughters, in equal parts, for their respective lives. The homestead was

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sold by the executors, the son's part producing \$24,000, and the daughters', \$26,000, all of which was invested by the executors, as well as the residue, in a common fund made up of those moneys and the rest of the estate, and the income therefrom divided according to the interests of the son and daughters therein.—*Held*, that those who are interested in the proceeds of the sale of the homestead are not entitled to preference, in respect of those proceeds, in the administration of the fund.

Bill for directions. On final hearing on bill.

Mr. A. Zabriskie, for complainants.

Mr. C. L. Corbin and *Mr. M. T. Newbold*, for defendants.

THE CHANCELLOR.

John Tonnele, late of Hudson county, died in 1854. By his will (a full abstract of which will be found in *Wetmore v. Zabriskie*, 2 Stew. Eq. 62), after a gift to his wife, he gave part of his homestead to his son, for life, and the rest of that property to his daughters, for life, and gave the residue of his estate to his son and daughters, in equal shares, for their respective lives. He made his executors trustees of the property given to his children, except the part of the homestead given to the son. In 1864 his executors sold the homestead, the part devised to the son for life, for \$24,000, and the rest for \$26,000. They also converted the residue of the estate, with perhaps insignificant exceptions, and invested the proceeds of all the sales in bonds and mortgages and government securities. There never was any assignment of the securities to the funds, but up to May 13th, 1878, the interest and income of the securities were annually divided as follows: The son was credited with legal interest on the \$24,000, and each daughter with like interest on her share of \$25,380.91, which is the balance of the \$26,000 which remained after paying to the surviving children of the testator their shares of the interest of one of the daughters who died, in the share of her sister who predeceased her, in the \$26,000, and then each child was credited with one-sixth of the balance of interest and income. At the last-mentioned date, in view of the

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fact that there was depreciation of some of the securities, another method of distribution was substituted (and it has ever since been pursued), by which the whole interest and income of the fund were distributed in the proportions which the interests of the children respectively bore to the whole fund, giving no preference to their interests in the proceeds of the sale of the homestead property. The son is dissatisfied with this latter method, and the trustees now ask advice on the subject.

The son claims that the first-mentioned method is the just one, because, as he insists, the money derived from the sale of the homestead should be treated as a special fund, as it was treated prior to May 13th, 1878. But this claim cannot be allowed. The trustees did not, as before stated, make any assignment of the securities to the respective funds, which, for identification, they designated as the son's special fund, the daughters' special fund and the general fund. There is no question raised as to the character of the investments. According to the bill, they were all of the description which is recognized as allowable for trust-moneys. There is no ground for claiming preference for the money derived from the sale of the homestead. The cases on the subject of the order of liability for the payment of debts of lands specifically devised and land passing under devise of the residue, which were cited on the argument, have no applicability to this matter. Nor do the cases on the subject of abatement of legacies apply. Here is no question of liability, but a claim that of three trust funds, in the hands of the same trustee, which have been mingled in investment, two have preference over the other merely because the former are derived from specific devise, and the latter from devise of the residue. It would perhaps (especially in view of the fact that there has been depreciation) have been more satisfactory if the trustees had assigned the investments to the funds so that those belonging to each might have been identified, but it cannot be said that their failure to do so has done any wrong to the beneficiaries. The will gave no direction that the funds should be kept separate from each other. The gains and losses

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upon the investments must of course be proportionately distributed.

The annual net income should be distributed in the proportions which the interest of each child in the fund bears to the whole fund, without preference.

One of the daughters has died, leaving three children, who are now entitled to and demand their interest in the fund given to their mother for life. The bill asks direction on that head, but the matter was not discussed on the hearing. Their share may be paid to them by a just and equitable assignment of securities.

JULIA P. OUTCALT

v.

JACOB CHARLES APPLEBY et al., executors and trustees, et al.

A testator gave \$5,000 to each of his children who should survive him, payable at the end of one year after his death, deducting therefrom any moneys due from any child or the husband of any daughter, as shown by his books of account, which were to be conclusive evidence of the fact and amount of such indebtedness "for all purposes under the will," and, if not paid, then to be retained by the executor from such delinquent's income, which was payable under a subsequent provision in the will. The net income of the residue was to be paid equally to the sons and daughters during their lives, with remainder to their children. The executors were also empowered to erect buildings, at their discretion, on designated lots of land in New York city, and on certain other lots there with the consent of the majority of the children then living.—*Held*,

(1) That each beneficiary of the residue was, after deducting the debt payable from that share, entitled to the net income thereon from the date of testator's death.

(2) That the debts due from the children or the daughters' husbands bore interest, and that the amount of such indebtedness was not limited to the amounts severally charged in the testator's books.

(3) That the appreciation in value of the unproductive property while awaiting a satisfactory sale by the executors, was a part of the *corpus* of the estate, and not of the income.

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(4) That the cost of extensive repairs of the buildings, made in order to secure a better class of tenants and increased rents, must be paid out of the income.

(5) That the claim that interest should be allowed to the life-tenants on the moneys of the *corpus*, used in building new houses, to be computed from the time when the moneys were expended until the time when the houses were completed, could not be admitted.

(6) That ordinary taxes and expenses of improved lands must be paid out of the income, while assessments for permanent improvements may be equitably apportioned between the life-tenants and remaindermen.

(7) That the residuary estate, being held by the executors on a continuing, active trust, should not be divided even if a partition might appear practicable.

(8) That a reference would not be ordered to ascertain whether any more buildings ought to be erected in the state of New York, on the ground that it may be held that the will creates an unlawful estate under the laws of New York; the reference being unnecessary.

(9) That the unproductive land ought not to be divided, but an inquiry as to the propriety of the executors selling it, or any part of it, may be ordered.

(10) That no income from the residuary estate can be paid to beneficiaries until the debts to the testator charged on their shares are satisfied or secured.

Bill for construction of will and an account and directions to the trustees. On final hearing on bill and answers.

Mr. R. Wayne Parker and *Mr. C. Parker*, for complainant.

Mr. John Linn, for the executors.

Mr. T. N. McCarter, for the remaindermen.

THE CHANCELLOR.

Leonard Appleby, late of this state, died March 17th, 1879, leaving a will dated March 2d, 1871, and a codicil thereto, dated May 23d, 1877. By the eighth section of the will he gave to each of his sons and daughters who should survive him \$5,000, to be paid at the end of one year after his death, and provided that if either of them, or the husband of either of his daughters, should be indebted to him at the time of his decease, according to his books of account, which were to be conclusive evidence of the fact of the indebtedness and of the amount thereof, for all purposes under the will, such sum of \$5,000, or

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so much thereof as should be required to pay such indebtedness, should be retained by his executors, and applied to the payment of such indebtedness, or on account thereof, if the indebtedness should be greater than the \$5,000. And in the latter case he authorized and directed his trustees, or their successors, unless the amount of the indebtedness should be paid or secured to their satisfaction, to retain the income of the son or daughter so indebted, or of the daughter whose husband should be so indebted, arising out of the trust estate created under the tenth section of the will, and apply it to the payment of the indebtedness, until the several debts should be fully discharged. By the ninth section he makes certain provision for grandchildren, and by the tenth he gives the residue of his whole estate to the executors in trust, to receive the rents, issues and profits, dividends, interest and income, and, after deducting all necessary and proper charges and expenses, to apply the net income, one-seventh to the use of each of his seven sons and daughters for life, free from creditors, and, as to his daughters' shares, free from all rights, claims or interference of their husbands; and on the death of the beneficiaries for life, to pay the shares to their respective issue, with contingent limitation over. By the fourteenth section he empowers his executors, at their discretion, to build on certain lots of land in the city of New York, and, with the consent of the majority of his children living at the time, to build on other land there. By the codicil, among other things, he gives two of his daughters \$8,000 each, and to the other, the complainant, \$4,000, and provides that those sums are not to be paid by his executors until the indebtedness of his daughters' respective husbands to his estate shall be fully paid.

NOTE.—A life-tenant must bear and pay the costs of repairs to the premises, taxes, assessments &c., *Holcombe v. Holcombe*, 2 Stew. Eq. 597, note; *Garland v. Garland*, 73 Me. 97; *Wheeler v. Addison*, 54 Md. 41; *Müller v. Shields*, 55 Ind. 71; *Benagh v. Turrentine*, 60 Ala. 557; *Carter v. Stookey*, 89 Ill. 279; *Graves v. Cochran*, 68 Mo. 74.

Debts charged in a testator's account-book, and referred to in his will, are not conclusive, *Donnay v. Borradaile*, 10 Beav. 263; *Hoak v. Hoak*, 5 Watts 80; see *Lawrence v. Lawrence*, 4 Redf. 278, 7 Hun 641, 68 N. Y. 108; *Fellows v. Little*, 46 N. H. 27; *Sims v. Sims*, 39 Ga. 108; *Shawhan v. Shawhan*, 10 Bush 600.—REP.

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This suit is brought by one of his daughters against the executors and trustees (the same persons) under the will for an account of the estate, and of their transactions therein, and a statement of the accounts between the testator and his children and sons-in-law, and for the marshaling of the last-mentioned accounts, and for special directions to the trustees in the management of the estate. The cause is brought to a hearing on the bill and the answer of the executors and the formal answers put in for infant defendants. No adjudication of any of the matters submitted, where the decision in anywise depends upon the facts, would be warranted as affecting the rights of the infant defendants, seeing that there is no proof in the case as against them. Only such of the questions discussed as may be properly decided without regard to the particular facts outside of the will, or the decision of which will not be controlled by such facts, will, therefore, be passed upon.

The complainant asks that it be decreed that there be an account, and that the court further adjudge, as hereinafter stated in the several propositions mentioned and considered. That there should be an account is admitted, and the executors and trustees join in the submission of matters in controversy, in regard to the management of the estate, to this court.

The first proposition is, that the person to whom the income of a share of the estate is given by the will is entitled to the net income of the whole of the share from the death of the testator, subject only to the deduction of the debts due the testator from him or her, or, if it be a daughter, from her husband. It is the rule that where the residuary estate is given to a legatee for life, the interest which accrues thereon from the time of the death of the testator, shall, in the absence of any direction to accumulate or any other direction to the contrary, and if not required for the payment of debts or legacies, go to the life-tenant. *2 Roper on Leg. 1322; Green v. Green, 3 Stew. Eq. 451.* In this case there is no direction to accumulate, nor any other direction against paying to the life-tenants the interest from the testator's death, except that which relates to the payment of debts of the legatees

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and the husbands of the daughters, and therefore, if the interest is not needed for the payment of the testator's debts or legacies, the tenants for life will be entitled to it from the time of the testator's decease, subject to the application thereof, if needed for the purpose, to the payment of debts due the testator from the legatees or the husbands of the daughters, according to the provisions of the will.

The second proposition is, that those debts do not bear interest. It is true that advancements do not bear interest, but debts do. That the debts in question are not to be regarded as advancements, is evident from the fact that the testator, by the will and codicil, not only calls them debts, but provides that on the payment by either of his daughters of the indebtedness of her husband to his estate, the debt shall be the property of the daughter. And he also provides that his executors may, if they deem it advisable, proceed to collect the debts, notwithstanding the provision made by will for the payment of them. The decree will not adjudge that the debts in question do not bear interest.

The complainant insists that the amount of indebtedness chargeable against the children cannot exceed the amount charged against them in the testator's books. This proposition is based on the provision in the eighth clause of the will, that the testator's books of account shall be conclusive evidence of the fact and amount of indebtedness, for all purposes under the will. But the testator evidently intended, by this language, that his books should be accepted as conclusive as against his sons and daughters and the husbands of the latter. His language in the rest of the clause gives no support to the idea that he intended to forgive, or leave out of account in connection with his gifts under the will, all debts, both of his children and the husbands of his daughters, which might not appear on his books, but leads to the contrary conclusion. And in the eighth clause of the codicil, where he refers to the indebtedness, and provides that the moneys thereby given to his daughters shall not be paid to them until the indebtedness of their respective husbands to his estate shall be fully paid, he does not limit or confine the indebtedness to the charges on his books, or in any other way. Again, it is

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quite clear that there might have been, as it is admitted there was, in fact, in the case of the complainant's husband, contingent liabilities on the part of the testator as surety, which could not justly be charged by him on his books against his children or sons-in-law as debts, but which after his death became such. He undoubtedly intended to provide for indemnity to his estate for any money he might be compelled to pay on account of any such liability.

The third proposition is, that the appreciation in value of the unproductive property held by the trustees in the exercise of their discretion, with a view to getting a satisfactory price therefor, shall be regarded as income and not as part of the *corpus* of the trust estate. There is nothing in the will to authorize the making of such a decree, and sound principle forbids it. The unproductive property constitutes part of the trust estate to be managed, and the whole estate is to be husbanded for the benefit of all the beneficiaries, the remaindermen as well as the life-tenants. The trustees are vested with a discretion as to the time when the conversion of the property, unproductive as well as productive, into money is to take place, and the life-tenants are no more entitled to have the appreciation in value of the one than of the other description of property regarded as income. The appreciation in either case is part of the *corpus*.

The fourth proposition is, that extraordinary repairs to buildings, necessary to put them into a tenantable condition, are to be charged to the *corpus* of the fund and not to the income. It appears, from the answer, that the buildings on which the repairs in question were made were all of them, except one, wholly or partially occupied by tenants at the time of the testator's death, and the repairs were necessary in order to secure a better class of tenants for them, and therefore to increase the income derivable therefrom; that the repairs were not, in fact, in the judgment of the trustees, extraordinary in their character, and can only be so called in view of the extraordinary extent to which the buildings were in need of what are called ordinary repairs; that the immediate effect of the repairs was that higher rents and a better class of tenants were obtained; that in many in-

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stances the rentals of the buildings were more than doubled by reason of such repairs, and that in the opinion of the trustees, the increase of income will be sufficient to repay to the life-tenants, in a very short time, the expense of the repairs, with interest. Where real estate is settled in trust for a tenant for life with remainder over, the expenses of the substantial repairs to the estate must be defrayed out of the interest of the tenant for life in possession. *Hill on Trust. 606.* In *Nairn v. Marjoribanks, 3 Russ. 582*, a suit for administration of the trusts of a will, the tenant for life alleging that the roof of the mansion-house was constructed on a bad principle, and that unless it was removed and replaced the house would sustain considerable injury, applied for a reference with a view to payment of the cost of removal and reconstruction of the roof out of the *corpus* of the estate. Lord Eldon refused the reference, saying that if the master should report that it would be for the benefit of all parties that improvements should be made in the mansion-house, he would not confirm the report. And in *Hibbert v. Cooke, 1 S. & S. 552*, V. C. Sir John Leach refused to direct an inquiry as to the expenses incurred by a life-tenant in repairs to the mansion-house rendered necessary by the dry rot. It does not appear in the case in hand that anything has been done by the trustees in the way of repairs, which was not of such a character as to be a just charge on the income.

The fifth proposition is, that interest should be allowed to the life-tenants out of the *corpus* on all moneys used in the building of new houses; such interest to be computed from the time of expending the moneys to the time of the completion of the houses. The will authorizes and empowers the trustees to build houses on certain lots of land in the city of New York at their discretion, without the consent of the testator's children, and on certain other lots there with their consent. The obvious effect of such building is to make that which was unproductive property, productive. There is not only nothing in the will to justify the charging of the estate in remainder with interest on the money used in making the authorized improvements (and in principle such charge would be clearly unwarranted), but the tes-

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tator, by a provision contained in the clause which authorizes the making of the improvements, evinces his intention that no such charge shall be made unless the moneys be taken from certain funds; in which case he provides that interest shall be paid to the funds from which the moneys may be taken. By that provision he authorizes the trustees to use for the building of the houses all or any part of the trust moneys in their hands belonging to the trust under the residuary clause, and in their discretion to advance and use any moneys in their hands held in trust under any of the other clauses of the will, but provides that if they shall use any of the last-mentioned moneys, the amount used shall be treated as an advance and loan to the trust created by the residuary clause at interest payable semi-annually, and constitute a lien on the property held under that trust; such lien, however, not to affect the title to the land in case the trustees shall decide to sell and convey it free from the lien.

The sixth proposition is, that the taxes and expenses of unimproved lands should be paid out of the principal of the fund, and not out of the income.

While the unimproved property remains unconverted, all the ordinary taxes and expenses are to be paid out of the income derived from the rest of the estate. The tenant for life is bound to pay ordinary taxes and expenses. As to assessments for improvements which go to the benefit of the inheritance, such probably would not be the rule, but some equitable method of apportionment between the income and *corpus* would be adopted. Here, by the trust, all the residuary property, improved and unimproved, is given for the benefit of the life-tenants, and on conversion they will be entitled to the rents and profits, of course, to the exclusion of the remaindermen. The trust estate must be dealt with in the respect under consideration as a whole. The trustees, in view of the interest of the life-tenants (the obligations of the trust also prohibit them from doing so), could not relinquish the unimproved property to the remaindermen, but must hold it for the benefit of both. Moreover, it may be remarked, the testator, in speaking of the residuary estate, treats it as a whole. He gives to the life-tenants the net rents, issues

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and profits thereof, after payment of all necessary and proper charges and expenses. The delay in making the conversion is presumably for the interest of both parties, but should the trustees abuse the discretion given to them, this court is open to the beneficiaries to hear their complaint and redress their grievances.

The next proposition is that the residuary estate should now be divided, as far as practicable, into seventh parts. The object in seeking such partition is to individualize the respective interests of the life-tenants, with a view to identification, so that each may bear only its own share of the burdens and reap its own share of the benefits. That such division would be productive of inconvenience is obvious from the fact that there is a power, as yet unexercised, but which may hereafter be used, dependent for its exercise on the concurrent judgment of the trustees and that of the majority of the testator's living children, which may require the expenditure, in improvements, of moneys held in trust under the residuary clause. Reference is now made to the provision for the improvement, by erecting buildings thereon, of the ten lots of land at and adjoining the corner of Sixth avenue and One Hundred and Sixteenth street, in the city of New York. Moreover, the testator evidently did not contemplate a division of the residuary estate as now proposed. By the fifteenth clause of the will, he provides that on the death of either of his children, his trustees may either convert the unsold real estate, in order to ascertain and pay such child's share to those who shall then be entitled to receive it, or, having ascertained by arbitration the value of such real estate, may pay the value of the child's share therein and retain the real estate unsold for the benefit of the trust. He evidently contemplated that the trust would continue as a family arrangement *in solido*, except as from time to time shares might be paid over as his children should die; and to this end he provides by the sixteenth section of the will for the keeping up by his children themselves of the succession of the trustees, and for the acceptance by a majority of them of the resignation of a trustee and the settlement and adjustment of his accounts. By the thirteenth section of the will, he expresses his wish that the trustees hold

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the improved property unsold for ten years from his death (until 1889), unless, in their judgment, it would not be advisable to do so. Further, it may be added, it does not appear that such partition is at all practicable.

The next proposition, the eighth, is that inquiry be made as to how far the personal assets can properly be invested in building in the city of New York.

The will defines the extent of the power given to the trustees to build on the land of the residuary estate in New York. As to fourteen lots which it specifies, they may build on them at their discretion; and as to ten others, also specified, they cannot do so unless the majority of the testator's children living at the time shall consent to it. It seems quite clear that there is no necessity for a reference on this point. It was suggested, however, on the hearing, that there may be prudential considerations, based on the possibility that the residuary clause might, if assailed, be held invalid by the laws of the state of New York, on the ground that it creates an unlawful estate, which would induce this court to prohibit further expenditures of the trust-money in building in that state. A reference is not necessary to determine any such question, if it be raised. The court will itself, in the first instance, dispose of it.

The ninth proposition is that there be a reference as to whether the unproductive land should be sold or divided.

It seems clear that such land ought not to be divided among the life-tenants. The interest of those in remainder forbids. The non-payment of taxes by the life-tenants might endanger the estate of the remaindermen, and the latter ought not to be deprived of the care of the trustees over the property while it remains unsold. If assignment by the trustees of the unproductive property in equal proportions to the several shares is what is meant, such division is unnecessary and inexpedient. It is enough to say, however, on this head, that the court will not annul the trust which the will creates as to the property. By that trust the conversion of the property is left to the discretion of the trustees, and they are charged with care of and supervi-

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sion over it. There may be an inquiry as to the propriety of selling the unproductive property at this time.

The tenth proposition is that the life-tenants shall have some income on their shares paid to them annually, although their indebtedness, or that with which their shares are chargeable by the will, may not yet be paid.

This proposition is based on the assumption that the testator did not intend that his children should be wholly deprived of income at any time. But such an assumption cannot be justified, for the testator, by the eighth section of the will, expressly directs the trustees to retain the income of his children until the debts which he has charged thereon shall have been fully discharged or secured to the satisfaction of the trustees. He unquestionably intended, as he expressly says, that his children shall not have any income from their shares so long as the debts due from them, or with which their shares are chargeable, shall be unpaid, unless the debts be secured to the satisfaction of the trustees. Moreover, it may be added, none of the children are minors, and it does not appear that there is any necessity for the interference by this court with the plain and explicit directions of the testator. There will be a decree for account, and an inquiry as to the advisability of selling the unproductive real estate.

THE HOBOKEN BANK FOR SAVINGS

v.

PETER H. BECKMAN et al.

1. Where a father conveys all of his property to his two young sons, under suspicious circumstances as to the time, the method and the consideration thereof, the fact that the deed itself purports to have been given for a valuable consideration, and that the answers of the sons, under oath, aver that it was so given and was *bona fide*, will not sustain it as against the father's creditors.

2. Evidence of the statements of one of the two sons as to the partnership

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debt which is claimed to be the consideration of the alleged fraudulent conveyance, is competent against the other son.

Creditor's bill. On rehearing of final decree.

Mr. F. B. Ogden, for complainant

Mr. R. Parmly, for defendants

THE CHANCELLOR.

This cause has been reheard. At the original hearing, which resulted in a decree for the complainant (*Hoboken Bank v. Beckman*, 6 Stew. Eq. 53), part of the evidence was not before the court, but was inadvertently omitted from the record. It relates to the encumbrances on the property in question. That evidence is now before me. There is also additional evidence as to the age of William Beckman. The facts of the case are, that the complainant obtained a decree in this court August 8th, 1878, against the defendant, Peter H. Beckman, for deficiency, if any there should be, in a suit for foreclosure of mortgage. The deficiency was found to exist, and the amount was ascertained on or about March 27th, 1879, and an execution against goods and lands issued against him therefor, April 4th, 1879, which was returned wholly unsatisfied five days afterwards. After the decree for deficiency (which, as before stated, was made August 8th, 1878), and before the deficiency was found to exist, Peter H. Beckman conveyed the property in question, a large amount of real estate in Hudson county, to his two sons, William and Henry, for the consideration as expressed in the deed of \$7,758.88. The deed is dated March 14th, 1879. The sheriff's sale in the foreclosure suit took place thirteen days afterwards. By the answer, the defendants make the following statement as to the consideration of the deed: That William and Henry, under the firm of Henry Beckman & Brother, have been, since July, 1876, or thereabouts, the proprietors and owners of a livery stable in Jersey City, and have been the owners of, and have carried on there a large and thriving business as undertakers, in

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connection with their stable ; that their father, understanding the management of business better than they, was permitted by them, at his request, to take care of and manage the financial part of the business for them, to collect and be the custodian of the moneys of the firm, and to pay those moneys out for the firm as necessary in the conduct of the business ; that he so received for them large sums of money more than he paid out, and that at all times there was a large amount due them from him on that account, which he frequently promised to adjust, but never did until an accounting was had between them and him about the date of the deed, and that the consideration of the deed was the amount then found due to them from him. The value of the property conveyed was \$50,000, if the title to all of it were in fee, but as to part, valued at about \$29,000, the title is merely a tax title. When the cause was heard originally, there was no proof before me as to the amount due on the encumbrances. Making due allowance for, and deduction of the encumbrances, it appears that the value of the property conveyed, over and above all encumbrances of every kind, was \$5,546.05, not taking into account the land held by tax title, of which there was a large amount, the fee of which, as before stated, is valued at \$29,000. What the value of the tax title to it is, does not appear. The circumstances of the case lead to the conviction that the transaction was fraudulent. The father owed no other debt than the contingent one for possible deficiency to the complainant, except the alleged debt to his sons. He conveyed all his property by absolute deed to his sons for an alleged debt of \$7,758.88, none of the particulars of which are given, and which, it is alleged by the answer, was due from him to them for money of theirs which he had collected as their agent, in a business carried on in their names, but of which he had, as their answer states, the financial management, making the collections and paying the bills. They say they could get no account from him on the subject of his transactions until the time of making the deed. Why he gave them an absolute deed instead of a mortgage does not appear. Nor is any reason given why he accounted to them at that particular time. He conveyed all his

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property to his two sons under circumstances such as to induce strong belief that it was done to defeat the complainant in the collection of its debt, if there should be a deficiency on the sale of the mortgaged premises.

It is urged by the defendants, however, that the fact that the deed purports to have been given for a valuable consideration, and that the defendants, by the answer, which, according to the requirement of the bill, is on oath, allege that there was a valuable consideration, and that the conveyance was *bona fide*, casts on the complainant the burden of proof, and it is insisted that the presumptions in favor of the defendants from those circumstances have not been overcome. But in such a case as this, where the conveyance is made under circumstances which, as stated by the answer itself, are abundantly conducive to doubt, to say the least of it, as to the fairness of the transaction—where the grantor is a father who, on the eve of the issuing of an execution against him for a debt for which a conditional judgment has already been entered against him, transfers all his property by absolute deed to his two young sons for money which they say he had owed them for a long time for collections in a business which, though carried on in their names, was managed by him in its financial part, and no particulars of any kind are given in respect to this debt, and there does not appear to have been any voucher for it, and no discharge given when the conveyance was made—it is not enough, even in the absence of other evidence, to protect the transaction from the condemnation of the court, as having been designed to defeat creditors, that the deed declares that it was made for valuable consideration, and the defendants swear so, too, in their answer, and add an asseveration that the conveyance was made without fraud. The statement in the former opinion that one of the sons was a minor, was an error, but it now appears by the affidavits put in on the rehearing that William came of age February 8th, 1879, only a little over a month before the deed was made. What the other brother's age was does not appear. According to the answer, William and his brother have been in the business out of which the alleged indebtedness arose since July, 1876, so that

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the former went into it when he was a minor but eighteen years and five months old, and he was a minor up to a few days before the time of making the deed.

There is, however, some other evidence in the cause strongly tending to show bad faith. Allusion is now made to the testimony of Mr. Sherman, the complainant's president, as to what was said to him by one of the two sons. It is argued on the part of the defendants that this testimony, being only of one of the two, is not competent as against the other, but it clearly is competent on the question whether there was a fraudulent combination of these parties, to show what one of the partners said in reference to the transaction, especially as to the alleged partnership debt which is made the consideration of the conveyance which is assailed. Mr. Sherman testifies that in the beginning of April, 1879, after the conveyance had been made, one of the sons came to the bank and he had a conversation with him in reference to the sale of the property by his father to him and his brother. He says he, Sherman, asked him whether he had bought the property from his father, and he said he had; that he, Sherman, asked him how much he had paid his father for it, and he said he did not know; that he repeated the question, and young Beckman again said he did not know, and added that "it was not fixed upon (or fixed up) yet—it was on their books" or "the books;" that he asked him if he paid his father any money, and he repeated that he "could not tell; that it was not fixed upon (or fixed up) yet." Mr. Sherman says he asked him whether he was working for his father, and he said he was. On cross-examination, he says young Beckman said he *had been* working for his father. He also says that the young man stated that his father had sold the property to him alone, and he thinks that the father said that he had sold the property to that son.

I am not only unable to conclude that the conveyance in question is free from fraud, but I cannot resist the conviction that it was in fact fraudulent. The defendants urge on the attention of the court the case of *Fifield v. Gaston*, 12 Iowa 218, as one very similar in its circumstances to this, in

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which the conveyance was sustained. In that case, however, the conveyance was not made to a son, but to a stranger, a creditor of the grantor, for wages for work done for the latter; the consideration was proved, and the grantee admitted that the deed was merely a mortgage to secure his debt. The cases of *Sayre v. Fredericks*, 1 C. E. Gr. 205, and *Morris Canal v. Stearns*, 8 C. E. Gr. 414, and S. C., 9 C. E. Gr. 588, are more applicable to this, and are authoritative. In the former, it was held that the denial of fraud in an answer will not avail to disprove it where the answer admits facts from which fraud follows as a natural and logical, if not a necessary and unavoidable, conclusion. In the other, the debt which was the consideration of the conveyance, was established, but the value of the property was much in excess of it. The debt was due to the estate of the grantor's deceased brother, and the deed was given to the administrators. The fact that there was such excess in value, and the fact that the conveyance was made after the complainant's claim had been placed in an attorney's hands for collection, and the debtor had knowledge of the fact, and had requested the attorney to delay bringing suit against him on it, suggesting that there might be some adjustment of the matter, were regarded as proof of fraud, and the deed was set aside as against the complainant's judgment. There is no error in the final decree in the case under consideration.

MARY L. MATHIEZ

v.

OLIVE S. DAY et al.

A conveyance of lands in this state by a husband and wife to the husband's brother-in-law, was sustained against a judgment creditor of the wife on a judgment recovered in another state for her tort, where it appeared that the grantee was entirely ignorant of such judgment, and bought the lands, as he

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had been often importuned to do, at the request of the grantors, because of their inability to pay the taxes, assessments and encumbrances on the lands, although the grantee knew nothing about the property, had never seen it, and relied upon the grantor's statements as to the title, value and encumbrances.

Creditor's bill. On rehearing of final decree.

Mr. J. W. Herbert, for complainant.

Mr. B. C. Chetwood, for defendants.

THE CHANCELLOR.

This suit comes before me on a rehearing of the final decree dismissing the bill, made on the advisory opinion of Vice-Chancellor Dodd. The complainant, on the 14th of April, 1879, recovered a judgment for \$363.34, including costs, in the city court of Brooklyn, in the state of New York, in a suit brought by her against Mrs. Day. The action appears, from the briefs of counsel, to have been for damages for a tort. On that judgment a suit was brought in the circuit court of Hudson county, in this state, on or about the 7th of January, 1880, and judgment recovered by the plaintiff therein on the 23d of April following, for \$415.07, debt and costs. An execution against goods and lands was issued upon that judgment, and returned unsatisfied before the filing of the bill. By deed dated March 28th, 1879 (but not recorded until January 22d, 1880), Mrs. Day, with her husband, conveyed to John C. Spencer, of the city of New York, for the consideration, as expressed in the deed, of \$500, a vacant lot of about half an acre, in the township of Union, in Hudson county. At the same time she and her husband conveyed to the same grantee two houses and lots in Brooklyn, and a tract of four acres at New Lots, on Long Island, belonging to her, and also a house and lot, owned by Mr. Day, adjoining the lot in Union township. This suit is brought to subject the first-mentioned property, the lot of half an acre, to the payment of the complainant's judgment, on the ground that the conveyance to Spencer, though made before the recovery

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of either of the judgments, was fraudulent as against the complainant. Spencer was the brother-in-law of Mr. Day. He swears that the latter had been, for several years before the purchase, trying to sell the properties to him, and had been trying to borrow money on them from him, but he had refused these applications; that Day came to see him several times during the ten days preceding the sale, and urged him to buy the properties, because the Days could not keep any of them by reason of the encumbrances (mortgages, taxes and municipal assessments) which were upon them, and were obliged to sell; that he finally told Day that he would buy them, and he did so, for about \$2,000, for all of them together, subject to the encumbrances thereon, and paid the money in cash to Day; that the lot in question was valued in the transaction at \$500, and there were \$300 of assessments on it, and that all the properties were in fact encumbered. He swears that the sale was an absolute one, and that he heard nothing of the suit against Mrs. Day until some time after the conveyance was made to him, and not until he was called to testify in the supplementary proceedings in the suit in this state. He swears, also, that the only reason he knew of for the Days selling the properties, was their inability to keep them because of the encumbrances upon them, and that he bought the properties with a full intention to keep them for his own benefit. It is a noteworthy fact in this connection that Day sold the house and lot in which he lived and which adjoined the property in question in this suit, together with the property of his wife. The suit was not against him but her alone. There obviously was no necessity (and as a practicing lawyer he must have known it) for selling his property in view of a judgment against his wife.

It is insisted on the part of the complainant that the fact that Spencer had seen none of the properties and knew nothing about them or their value, or the amount of encumbrances or the condition of the title, except from Day's statements, is evidence of the absence of good faith in the transaction. But while it exhibits his confidence in Day, his brother-in-law, it is not proof of fraud. It is also argued that the price at which the lot was

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sold to Spencer is evidence of fraud, inasmuch as it was, as is alleged, worth \$1,200. But there is no proof as to what it was worth when the conveyance was made. A single witness, who appears to have been examined in the absence of defendant's counsel, and was not cross-examined, says it was worth, when he testified, about \$1,200, but he does not say what it was worth when it was sold to Spencer, more than three years before that time. And the same criticism is to be made on the testimony of the witness (there is but one) who speaks of the value of the other properties. It may be added, also, that there is no proof in the cause as to the assessments on the latter properties. The truth seems to be that the Days, finding themselves unable to hold the properties by reason of the encumbrances upon them, pressed Spencer, as they had done often before, to buy them, and he yielded to their urgency and bought them absolutely and wholly on his own account, and with no knowledge or suspicion of the existence of any other reason (if any other reason there was) on their part for disposing of them or any of them. He may have obtained them at a low price. He undoubtedly, being an unwilling purchaser, thought he was doing so. If he did, and there was no fraud in the matter, he is of course entitled to the benefit of his purchase. The vice-chancellor who heard the cause on the oral testimony of the witnesses was of opinion that there was no proof of fraud in the transaction, and I concur in the opinion.

NANCY KENDALL et al., executors,

v.

JOSHUA KENDALL et al.

1. A gift of personal property for life, with power to the legatee to use it as she may deem proper, or to sell it, or any part of it, for her benefit, as she may deem needful or best—*Held*, to be an absolute gift.

2. A devise of a residue for the benefit of the testator's children, and in case

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of the death of them and their children without leaving any child or children them surviving, the residue to go, after the death of the testator's widow, to his "heirs bearing the Kendall name"—*Held*, a gift for life to the children (there being evidence that the testator intended to give only a life-estate to his children), with remainder in fee to the grandchildren with limitation over to the testator's heirs "bearing the Kendall name," in case of the death of the children, and their children, without leaving lawful issue surviving, in the lifetime of the widow.

Bill for relief. On final hearing on bill and proofs.

Mr. C. T. Glen and *Mr. J. R. English*, for complainants, *ex parte*.

THE CHANCELLOR.

John M. Kendall, deceased, late of the county of Union in this state, died on or about the 31st of July, 1879, leaving a last will and testament, dated January 10th, 1876, which has been duly admitted to probate and letters testamentary thereon granted to the executors, the complainants, who are his widow and one of his sons. By it, after providing for the payment of his debts and funeral expenses out of his personal estate, he devised and bequeathed as follows :

"*Second*. I give, devise and bequeath to my beloved wife, Nancy Kendall, the use and improvements of the homestead of thirty acres, with its buildings and appurtenances, situated in the township of New Providence, Union county and state of New Jersey, together with a tract of woodland consisting of five acres, situated in the Great Swamp, said tract being the same that I received from her father, Joseph Ludlow, to have and to hold the same to her for and during the term of her natural life; also all the household furniture and goods in my house where I now live, together with all my horses, harness, carriages, cows, hogs and live stock of every kind to me belonging, I do hereby give and bequeath to her, to have and to hold during her natural life and to use as she may deem proper, or to sell it, or any part of it, for her benefit, as she may deem needful or best. This gift, devise or bequest in this second article of my will to my beloved wife, Nancy, is intended to be in lieu of and full satisfaction and recompense for her dower and thirds, which she can in any wise claim of my estate.

"*Third*. I give, devise and bequeath to my son, Joshua Kendall, and his wife, Sarah Ann, the dwelling-house in which they now live and one-quarter of an

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acre of land immediately adjoining the same, to occupy, use and enjoy as a home for themselves and their family during the natural life of Joshua or of his wife. On the decease of both Joshua and his wife, the property which in this article I have given to them to use and enjoy during the period of their natural lives, shall revert to my estate, to be disposed of as hereinafter directed.

"*Fourth.* I give, devise and bequeath to my brother, William Kendall, and to my sisters, Margaret Kendall, Eliza Kendall, Maria Kendall, and Mrs. Ann Wooden (widow of Ezra Wooden, deceased), the house and lot containing about one acre where my brother William now lives, and also the undivided sixth part of a lot of land containing about twenty acres now cultivated and used by my brother William and his family, and which lies adjoining lands of Amos Potter and Daniel Pike, to have, hold and use to their benefit, free of rents or any charges as from my estate, during their natural lives. At the decease of my brother William and of my sisters named in this fourth article of my will, this property, which I have thus given to their use and benefit during their natural lives, shall revert to my estate and be disposed of as hereinafter described.

"*Fifth.* To my son, John Ludlow Kendall, I give, devise and bequeath the homestead where I now live, comprising—first, the tract of land on which my dwelling-house stands, said to contain ten acres, more or less, the same running back to the Passaic river; and second, the tract lying on the southeast side of the road leading to New Providence, described in two deeds, one given by John Crane to John M. Kendall, and one by Levi Clark and wife to John M. Kendall, said tract lying adjoining land owned by Daniel Pike, in the township of New Providence, Union county and state of New Jersey, together with all the hereditaments thereunto belonging and which may remain at the decease of my beloved wife, Nancy, to him, his heirs, executors, administrators and assigns, to have and to hold forever, the same to take effect after the decease of my wife.

"*Sixth.* I give and devise all the remainder of my estate, personal and real, of which I may die seized or possessed, of whatever name and wherever found, to the following persons, viz.: My beloved wife, Nancy Kendall, and my son, John Ludlow Kendall, as trustees, to have and to hold the same to themselves, their heirs and assigns forever, upon the trusts following, viz.: I hereby instruct my said trustees, upon my decease, to sell any or all of the said remainder of my real estate at private or public sale, and invest the proceeds upon bond and mortgage, or to lease the same, as they may deem best for the interest of my estate; the said remainder of real estate is the following, viz.: A tract on Stony Hill, known as the Stiles lot; a tract joining the lands of Daniel Pike and William Johnson, known as the Clark lot; a tract situated in the Great Swamp, and known as the Elmer lot, of five acres; also the Potter lot of seven and a half acres, and the Stiles lot of seven or eight acres, the last three of which lie adjoining each other, and in which my brother, William Kendall, has a half claim. I also hereby authorize and instruct the aforesaid trustees to pay from the proceeds of the property entrusted to their care and control, to my son, Joshua Kendall, and my daughters, Hannah E.

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Benbrook and Sarah C. McBirney, such sums, from time to time, as in the judgment of the said trustees shall minister to the wants, necessities and comforts of them severally; and in the case of the death of my said son, Joshua Kendall, and of my said daughters, Hannah E. Benbrook and Sarah C. McBirney, and their children, without leaving any child or children them surviving, then I give, devise and bequeath all said residue or remainder of my estate, real and personal, after the death of my wife, to my heirs-at-law bearing the Kendall name; also I hereby authorize and instruct the aforesaid trustees to aid my son, Joshua Kendall, to keep in force his life insurance policy obtained of the Northwestern Mutual Life Insurance Company, No. 416 Main street, Milwaukee, in the state of Wisconsin, for five thousand dollars, believing this to be one of the ways in which from the property entrusted to them they may best aid him and his children. They shall furnish such sums, from time to time, for his aid and benefit, as they, the trustees, may deem wise and prudent."

The executors have paid all the debts and demands against the estate except a claim of \$3,000 and interest, made by the testator's son Joshua, upon an account stated, as the bill alleges, by and between him and the testator, and on which he has brought suit against the executors, which is now pending. On or about April 1st, 1872, the testator's son-in-law, David McBirney, being indebted to him to the amount of \$2,300, conveyed to him certain real estate, described as being on Bell's Corner, and took from him an instrument of writing, under their hands and seals, by which it was agreed that McBirney was to pay the testator every year so much of the debt as he could, together with all taxes and interest on so much of the money as from time to time should remain unpaid; and the testator agreed that on compliance by McBirney with the terms of the agreement on his part, and repayment of the \$2,300, with interest, he would reconvey the property to him. The agreement also provided that McBirney should not have the right to sell the property, except at a price sufficient to repay the testator all that should be due him for principal and interest, and for taxes and insurance premiums paid by him. McBirney demands a reconveyance of the property to him by the executors, on his paying them the amount which will remain due to the estate from him on account of that transaction, after allowing him a demand of his own against the estate and another of

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his wife's. The testator, in 1869, advanced to his daughter, Hannah E. Benbrook (who died four months before him, leaving a husband and two children, all of whom are still living) \$1,600, expecting to receive from her and her husband a mortgage to secure the repayment thereof, but the husband refused to execute the mortgage, and the testator never received any security or evidence of debt for the money.

The bill states that after the testator's death some of the persons interested under the will were very much dissatisfied with its provisions, and, to remove the dissatisfaction, an arrangement was made by the executors with them, by which it was agreed that Mrs. Benbrook's children should be charged with the money advanced (in the bill said to be \$2,000, but by the proof it appears to be \$1,600) to their mother, and interest thereon; that Joshua Kendall's claim against the estate should be compromised and settled, by conveying to him in fee the land given to him and his wife, for their joint lives, by the third section of the will, and paying him \$1,500 in cash; and that David McBirney should have a conveyance to him in fee of the land on Bell's Corner, on his receipting for the claims of himself and wife against the estate, and paying \$500. The parties were advised by counsel that owing to the fact that the Benbrook children are minors, that arrangement could not be carried out without a decree of this court authorizing it.

The executors ask direction as to whether they shall convey the Bell's Corner property to McBirney, on receiving the \$500 and a discharge of the claims of him and his wife, and whether they shall make the proposed compromise with Joshua.

Under the will, the following questions have been raised: *First.* Whether the widow's title to the personal property given to her is absolute or only a life-interest. *Second.* Whether the residuary clause is valid, and if so, to whom the property therein mentioned is to go. *Third.* If the clause is valid, whether the income or proceeds of that property are to be disposed of among the beneficiaries entirely at the discretion of the executors, or if not, how they are to be disposed of. *Fourth.* Whether so much of the testator's real property as is not particularly devised and

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not mentioned in the residuary clause, passes thereunder. *Fifth.* Whether the court will sanction and direct the executors to carry out the family arrangement before mentioned.

To dispose of these questions: The gift of personal property to the widow made by the second section of the will, is clearly absolute. Though, by the terms of the bequest, the property (which is consumable) is given to her for her natural life, there is also granted to her power to sell it, or any part of it, for her own benefit, if she shall see fit to do so. There is no gift over. The authority to sell is evidence of the extent of the interest intended to be given, and is not a mere power. She takes an absolute interest in the property, and not merely a life interest, with power of disposition, during her life. *Dutch Church v. Smock, Sax. 148; Bradley v. Westcott, 13 Ves. 445; Maxwell's Will, 24 Beav. 246; Pennock v. Pennock, L. R. (13 Eq.) 144; Diehl's Appeal, 36 Pa. St. 120.*

The gift of the residue is, in terms, in trust for the benefit of three of the testator's children, his son Joshua, and his daughters, Hannah E. Benbrook and Sarah C. McBirney (Mrs. Benbrook died in his lifetime, as before stated), with a limitation over, after the death of his wife, to his heirs-at-law "bearing the Kendall name," in case of the death of those three children and their children without leaving any child or children them surviving. It is urged that this residuary devise is void because of that limitation; that it contemplates an indefinite failure of issue, and therefore ties up the estate for more than a life or lives in being and twenty-one years afterwards, and creates a perpetuity. But that is not the true construction of the clause under consideration. The limitation over is in case of the death of the three children and their children, in the lifetime of the widow, leaving no child or children them surviving. In such an event, the residue is to go, after the death of the widow, to the testator's heirs-at-law of the Kendall name. If, then, the children and all their children shall not, at the widow's death, have died without leaving issue them surviving, the condition on which the limitation over rests will not exist, and that limitation will be at an end. Although the testator does not, in

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terms, give the fee in the residue to the children of his three children named in that clause, yet he does so by implication. He evidently did not intend that the property, after the death of his children, should go to his heirs generally bearing the name of Kendall, unless neither his children's children nor any children of the latter should be living to take the property. But he unquestionably intended that at his children's death, their children should take the fee in their parents' shares, and if his grandchildren should not be alive, his great-grandchildren should take. A fee will pass by will by implication of law. The following authorities and cases support this construction : *4 Kent's Comm.* 541 ; *2 Powell on Dev.* 212 ; *Ex parte Rogers*, 2 *Madd.* 449 ; *Dowling v. Dowling*, *L. R. (1 Eq.)* 442 ; *Holton* ad. *White*, 3 *Zab.* 330, 425.

The legal title to the residue is in the trustees, in trust to convert the residue into cash and invest the proceeds, or to lease it, and pay from the proceeds, whether derived from the investment or lease, to the testator's three children named in the clause, such sums, from time to time, as shall in the judgment of the trustees minister to the wants, necessities and comfort of the children severally, and the testator gives special direction as to certain aid to be given to the son. By implication the gift is for the benefit of those three children of the testator for their respective lives, and in equal shares, and after their death the property will go to their respective children *per stirpes*. But if, at the death of the widow, the three children and their children be all dead, without having left any child surviving them, the property will go to the testator's heirs-at-law of the Kendall name.

The design of the testator was to secure the proceeds or income of the residue to his three children named in the clause for their respective lives ; they were all to participate in those proceeds, but as to the payments to be made to each out of his or her share thereof, that was to be left wholly to the discretion of the trustees, except as he gave directions touching Joshua's share. That he meant to give to those three children only the income, is evidenced by the fact that in a certain contingency (that which has already been considered) he gives all the residue

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over. As each of the three children was to participate in the proceeds, and the testator does not say what the shares are to be, equity declares that the shares shall be equal. Therefore, the trustees are to hold the residue, and dividing the income into three equal shares, pay one of them to Joshua and another to Sarah McBirney, for their respective lives, in such sums and at such times as they shall judge proper according to the directions of the will, observing the testator's special instructions as to Joshua's share. The other share is to be accumulated, and if at the death of the widow either Joshua or Sarah, or any of their children or children's children, or the Benbrook children, or their issue, shall be alive, the share, with its accumulations, is to go to the Benbrook children or their children, if the former shall then be dead, for their title to the share will then be absolute and no longer defeasible. The other two shares will be held for Joshua and Sarah respectively for life, with remainder to their children, the remainder subject to being defeated by the condition on which the limitation over is to take effect.

The testator, in his statement in the residuary clause, of the property which constituted the residue, did not include certain properties which he had previously devised for life, with directions as to all of which but one piece, that after the termination of the life-estate or estates, they shall revert to his estate, to be disposed of as thereafter directed. It is quite clear that he intended that the remainder in those properties should constitute part of the residue, and the reason why he did not mention them in the residuary clause was probably that he supposed that it was unnecessary. Under the circumstances the general language of the clause will control. The testator clearly did not intend to die intestate as to any interest in those properties, and there is no subsequent direction in regard to them in the will, except the residuary clause. Where a testator, by general words in the residuary clause, covers all his property not previously specifically disposed of by the will, and then proceeds to state what the residue consists of, any omission of property in the particular statement will be regarded as accidental or unintentional, if nothing to lead to a contrary conclusion appears.

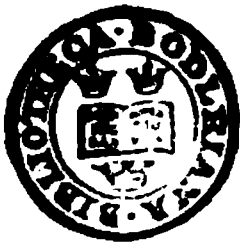
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The right of McBirney to redeem the Bell's Corner property is clear. The testator's widow testifies that the testator agreed to allow, and credit on account of the money he was to receive for redemption, the amount which was due to Mrs. McBirney for her services rendered to him before her marriage; but it does not appear satisfactorily what she is entitled to receive, if anything, from the estate for those services. They were rendered to her father in his household after she became of age. She says there was no special arrangement between her and the testator as to compensation for them, but that it was understood that she was to have a good outfit when she was married, which she never received. She claims \$780 for her compensation. The facts proved do not warrant the allowance. *Gardner's Adm. v. Schooley*, 10 C. E. Gr. 150. The amount to be allowed to McBirney on his own account is proved. The proposed compromise with Joshua would be sanctioned if the facts were established as alleged, but they are not. The advancement to Mrs. Benbrook is not chargeable against her children, and they cannot be made answerable for it. Their mother received nothing under the will, because she predeceased the testator. There is nothing whatever in the will to show that the testator intended the advancement to be an offset against or a charge on the interest in the estate which by the will he gave her; and the children take not by reason of intestacy but by devise. As a debt it is, so far as appears, barred by the statute of limitations. An advancement cannot, in the absence of evidence that the testator intended that it should be charged against the legatee, be set off against the legacy. In the case in hand it is to be observed that the will was made long after the advancement. An advancement, when it is allowed, does not bear interest.

The family arrangement which the court is asked to confirm and establish, is in derogation of the rights of infants who have interests under the will, with no corresponding advantage to them. It appears by the bill that some of the parties interested in the estate being dissatisfied with the provisions of the will, a family arrangement was made which was satisfactory to all the adult persons now interested under the will. Such persons, of

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course, may make agreements for themselves, and do not need the aid of the court in the premises; but to bind those who are infants, it becomes necessary to ask the aid of the court to sanction the arrangement. It cannot be granted; for not only is the arrangement not advantageous to the infants, but it would be wholly prejudicial to their interests, except as it may prove that it would be judicious to settle Joshua's claim by conveying to him therefor the fee of the property specifically devised to him and his wife for their joint lives.



HANNAH W. CORLIES

v.

ABNER ALLEN et al., executors, et al.

A testator gave the interest on \$10,000 to his daughter Elizabeth, without qualification, and after her death the interest on \$12,000 to his daughter Hannah, also without qualification. He then gave the residue of his estate to his executors in trust, for the use and benefit of Hannah for life, the interest to be paid to her "as she may need or require;" and after Hannah's death bequeathed that residue, "with whatever may have accumulated therefrom," to certain beneficiaries. Hannah is of weak mind.—*Held*, that she is entitled to only so much of the interest on the residuary fund as the executors may deem reasonably necessary, according to her station and situation in life.

Bill for relief. On final hearing on bill and answer of executors.

Mr. W. H. Vredenburg, for complainant.

Mr. R. Allen, Jr., for executors.

THE CHANCELLOR.

George A. Corlies, deceased, by his will gave and bequeathed to his executors, or the survivor of them, in trust, for the use

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and benefit of his daughter Hannah (the complainant), during her natural life, the interest to be derived from the whole residue of his estate of every character whatever, consisting of mortgages, bonds, notes and all other securities; said residue to be kept at interest by his executors, or the survivor of them, and the same, or parts of the same, paid to her "as she may need or require;" and after her death gave and bequeathed that residue, with "whatever may have accumulated therefrom," to certain persons whom he named. The hearing is on the bill and answer of the executors, and the only question submitted is whether the complainant is entitled to the whole of the interest of the residuary estate or only to so much thereof as, in the discretion of the executors, she may need for her comfortable support, according to her condition in life. The executors, according to their answer, have not paid to the complainant the whole of the interest, but, as they allege, have paid her, from time to time, since the testator's death, such sums of money as were necessary for her support, according to her condition in life, and amply sufficient to maintain her without any work on her part, and they allege in the answer that she is physically strong but mentally weak. The testator clearly used the word "require" as being substantially equivalent to the antecedent word "need," with which it is associated. It is as if he had said, "as she may need or her necessities require." In view of the admitted fact that the complainant is of weak mind, it is obvious that he did not use the word in the sense in which it was used in the will which was under consideration in *Lippincott v. Ridgway*, 3 Stock. 526, where the trust was to pay the interest to the testator's daughter, and so much of the principal as she, from time to time, by writing under her hand and attested by two credible witnesses, should require of the trustees. There the word was used in the sense of "demand." The gift of the whole of the interest to the daughter was absolute, and the gift of the principal conditioned only on her calling for or "requiring" it with certain formalities. Here the gift is not of the whole of the interest absolutely, but of the whole or such parts of it as she may need or require. Whether she is to re-

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ceive the whole or only part is dependent upon her wants, and the executors are, in their discretion, to determine whether her necessities require the whole or only part, and in the absence of *mala fides* on their part, this court will not interfere with the exercise of their discretion. That such was the testator's intention is further shown by the implied direction to accumulate the interest in the gift of the remainder in the residuary estate. At her death, the whole of the residue, "with whatever may have accumulated" thereon, is to go to the children of certain persons whom he names. It is true that in *Lippincott v. Ridgway*, the court held that a provision that the "accumulated interest" go, with so much of the fund as should remain undisposed of at the death of the life-tenant of the fund, to her children, was not evidence of an intention on the part of the testatrix to qualify the previous absolute gift of the interest to the tenant for life, but had reference merely to the interest which might accrue after the death of the life-tenant. In that case, however, the gift of the interest to the tenant for life was absolute. The direction was to pay her all the interest, as it should become due, so long as she should live. Here the gift to the complainant is not of the whole of the interest absolutely, but of the whole or only such parts of it as she may need or require. Further, the testator, in the previous part of the will, makes provision by trusts to pay interest to his other daughter, Elizabeth, and the complainant also, and in one of them (in favor of the former) directs that the interest of a fund of \$10,000 be paid (without qualification) to the beneficiary for life, on her receipt, and in the latter (in favor of the complainant) makes provision for the payment to the complainant, after her sister's death, of the interest (also without qualification) on \$12,000, and in like manner of the interest on \$3,000 also, in addition, for life. The fact that in these bequests the gifts are absolute in terms is evidence that he intended to qualify the gift in the residuary clause by the language he used, that is, that he used the language intelligently.

Van Blarcom v. Van Winkle.

AARON VAN BLARCOM, guardian &c.,

v.

RACHEL M. VAN WINKLE et al.

After certain specific legacies, a testator directed his executors to keep the residue of his moneys safely invested, and to take charge of and let his two houses, one of them being his homestead, and to keep them insured, and to collect the rents, during the widowhood of his wife. He then gave to his wife for life or widowhood, "for the support of herself and for the support and education of such of my children as are now minors, so long as they shall remain in the family with their mother, the possession and use of my homestead-house," together with the furniture &c. therein; and directed his executors to pay the net rents and interest "to and for the support of my wife so long as she shall remain my widow and unmarried, and for the support and education of my children remaining with her as part of the family, as above mentioned." He then gave the residue of his personal property, on the death or remarriage of his widow, to his two daughters, Jennie and Rachel, and his homestead to Rachel in fee, and his other house to Jennie in fee, and all of his other property to Rachel and Jennie equally. He declared that the provision for his wife was in lieu of her right of dower. He then provided as follows: "I order and direct that my minor children shall, in any event, be supported respectively during their minority out of the said interest and rents to be collected by my executor, as hereinbefore provided." The widow is dead; the executor has settled the estate and ceased to act as trustee, having paid over the estate to the guardian of the minor children. Two of the children are still minors.—*Held*, that the interest and rents of the whole estate, including the homestead, must be appropriated to the support and education of the two infants, or so much thereof as may be necessary for that purpose.

Bill for construction of will. On final hearing on bill and answer.

Mr. J. H. Rogers, for complainant.

Mr. F. Pulver, for defendants.

THE CHANCELLOR.

Isaac P. Ackerman died in 1877, leaving a widow and five children, three sons and two daughters, Jennie and Rachel. By

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his will he gave \$100 to each of his sons, \$2,000 and a specific legacy to Jennie, and a similar specific legacy to Rachel. He then made the following provision :

"I direct my executors to keep the residue of my moneys safely invested on bonds secured by mortgages or mortgage upon real estate, and receive and collect the interest thereon, and to take charge of and let and lease my house and lot on Pearl street, in the city of Paterson, and receive and collect the rents thereof, and to keep my houses and buildings on my lots on Pearl street and North Main street properly insured, during the widowhood of my wife. I give, devise and bequeath to my wife, Margaret Catharine, so long as she shall remain my widow, and if she shall [not] marry again, then during her lifetime, for the support of herself and for the support and education of such of my children as are now minors, so long as they shall remain in the family with their mother, the possession and use of my homestead-house and lot and premises, situate on North Main street, in the city of Paterson, and also of all my household and kitchen furniture and goods in and upon the same, and I order and direct my executor, after first paying for insurance and necessary repairs of my houses and buildings and taxes and assessments upon my real estate in Pearl street and North Main street, out of the interest of my moneys invested on bond and mortgage as aforesaid, and the rents of my Pearl street property, to pay the balance of said interest and rents to and for the support of my wife, so long as she shall remain my widow and unmarried, and for the support and education of my children remaining with her as part of the family as above mentioned. On the death or remarriage of my wife (whichever shall first take place) I give and bequeath the rest and residue of my personal property and estate to my two daughters, Jennie and Rachel, equally, and my said homestead house and lot and premises, being the property that I purchased of Albert Terhune, and known as No. 89 North Main street, in the city of Paterson, I give and devise to my daughter Rachel, her heirs and assigns forever, and my said house and lot and premises situate on Pearl street, in said city, and which I purchased of Nicholas P. Ackerman, I give and devise to my daughter Jennie, her heirs and assigns forever. All property that I may own or be or become entitled to, and not hereinbefore bequeathed or devised, I give and bequeath to my daughters Rachel and Jennie, equally, and to their heirs and assigns."

He then declared that the provision made for his wife was in lieu of all her rights, whether of dower or otherwise, in his

NOTE.—Under similar devises, what have been deemed reasonable expenses, *Moore v. Moore*, 18 Ala. 242; and the proper time for dividing the estate, *Owens v. Pearce*, 5 Lea 462; and see, also, *Hardenburgh v. Blair*, 3 Stew. Eq. 51, note.—REP.

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estate, and that on her refusal so to accept it, the devises to his daughters should take effect immediately. He then, by the last clause, provided as follows:

"I order and direct that my minor children shall, in any event, be supported respectively during their minority out of the said interest and rents to be collected by my executor, as hereinbefore provided."

The widow is dead. The executor has settled the estate. He has ceased to act as trustee, having turned over the estate to the complainant as guardian of the minor son and the daughters. Of the children, two are still minors, one son, Frederick, and the daughter, Jennie; the former about eleven years of age and the latter about eight. The question presented for decision is, whether the whole of the property is bound for the support and education of the minors. Rachel insists that only the interest of the "moneys" directed to be invested and the rents of the Pearl street property are bound therefor, and consequently that she is now entitled to the absolute enjoyment of the homestead property, and that that property is not subject to any charge or liability for the support or education of the minor children. Her counsel argues that, inasmuch as by the last clause of the will, the testator directs that the minor children shall be supported out of the "said interest and rents to be collected by the executor, as thereinbefore mentioned," and in the directions in the preceding portions of the will on the subject, no direction is given for the collection of the rent of the homestead, the latter property is not now, the widow being dead, charged with the support of the minors. But in the former directions the use of the homestead and furniture, together with the interest of the residuary personalty and the rents of the Pearl street property, is given to the widow for her support and the support and education of the minor children. By that provision an implied trust in favor of the minors is created. *Perry on Trusts* § 117. The widow did not refuse to accept the provision. The testator intended, by the last clause of the will, to secure the benefit of the trust to the children in any event, and to express his intention that it should not be defeated either by the death or remarriage

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of his widow, or her refusal to accept the provision in lieu of her dower. There is no evidence that he intended by it to limit the extent of the benefit, either as to amount or otherwise. It is worthy of notice that in that clause he makes no mention of education but only of support, and yet it is not to be supposed that he contemplated securing to the minors support merely in the event of his wife's death, remarriage or refusal to accept. The effect of the clause is to secure to the minors in any event, the benefit of the previous provision which he had made for them. And that provision included the use of the homestead and furniture. The rents of the homestead property as well as those of the Pearl street property, and the income of the residuary personal estate, are bound for the support and education of the minors during their minority. The residuary personal estate amounts to about \$3,300; the Pearl street property rents for about \$400 a year, and the annual rental value of the homestead is about \$350. The whole income is not very large. If it should prove that, after providing for the support and education of the minors, in any year, a surplus of income remains which can be distributed without prejudice to the rights of the minors, Rachel's equitable proportion thereof may be paid to her, but not otherwise. In *Berry v. Bryant*, 8 Jur. (N. S.) 69, where a testator gave the residue to his wife for life, to be expended by her for the maintenance of herself and her children, and after her death to be divided among the children, and to be paid to them as they should attain their majority, with right of survivorship, the court refused, in view of the trust for support, to pay over, even with the widow's consent, the share of a child who had become of age, lest thereby the right of the children to support should be prejudiced. There will be a decree in accordance with the views I have expressed. If the executor will not act as trustee, or for any other reason a new appointment of a trustee is desirable, it will be made.

Harrison v. Farrington.

IRA M. HARRISON, admr. &c.,

v.

JOSEPH T. FARRINGTON.

A bill by the administrator of a deceased partner against his copartner, alleging that the administrator had applied to such copartner for a statement of the accounts of the firm, showing its assets and liabilities and the balance due the administrator; that the copartner had rendered such account; that the administrator, in ignorance of the partnership affairs, and confiding in the copartner's statement, had, through the fraudulent representations and acts of the copartner, been induced to accept a less amount than was actually due his intestate from the firm, and also asking for an account, is not demurrable, because there has been, as claimed, an account stated, since the bill does not set out an account stated; nor because the bill seeks both an account and to surcharge an account as to the same matters; nor on the ground that the administrator has a remedy at law.

Bill for an account. On demurrer to parts of the bill.

Mr. S. C. Mount, for demurrant.

Mr. J. W. Taylor, for complainant.

THE CHANCELLOR.

The bill is filed by the administrator of John C. Johnson, deceased, against Joseph T. Farrington, Mr. Johnson's late copartner in the hardware business, in the city of New York, for an account of the partnership affairs. It states, among other things, that the complainant applied to the defendant for a statement of the accounts of the firm, showing the assets and liabilities and the amount due the complainant as administrator of Johnson; that the defendant gave him one; that the complainant, being ignorant of the affairs of the concern, and confiding in the defendant, believed that he might safely settle with him on the basis of the statement; and the bill alleges that the

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statement showed a balance due Johnson's estate of \$14,578.85. It also states that the complainant was induced to accept a smaller sum than that by the false representation then made by the defendant to him that the stock entered into the statement at cost instead of market value, which was less than the cost. It also alleges that the complainant has since then discovered that the defendant, in the statement, fraudulently charged Johnson's estate with a note made by one William C. Miller. It asks an account and that the defendant be decreed to pay what shall be found to be due after crediting what the complainant received. The defendant pleads an account stated, and answers in support of the plea. He also demurs to those parts of the bill which relate to the fraud in respect to the stock and the note. He insists that the complainant has an adequate remedy at law. It is also urged that the bill is multifarious, because it both seeks an account and also to surcharge an account stated as to the same matters.

The bill neither states nor admits that there was an account stated. It alleges that the complainant requested the defendant to give him a statement showing the assets and liabilities, and that the defendant gave him one which showed a certain balance due the complainant as administrator, and that he was induced by the defendant's fraudulent representations as to the stock and otherwise, and his fraudulent charge of the note, to accept a smaller sum than was his due, and he alleges that the statement was not correct in other respects besides those specified. The bill is merely a bill for an account, and those particulars are mentioned as a reason why the complainant should have an account, notwithstanding the fact that he accepted a sum as the balance due him. The demurrer will be overruled, with costs.

Martin v. New York, Susquehanna and Western R. R. Co.

JAMES F. MARTIN

v.

THE NEW YORK, SUSQUEHANNA AND WESTERN R. R. CO.

A deed for lands conveyed to the receivers of a railroad company contained a covenant that the company would build and maintain certain fences thereon, and the receivers further agreed, verbally, that they would give the grantor an annual free pass over the railroad, and renew the same annually during his life. The deed was duly executed and given to the grantor's attorney to be delivered. The receivers objected to the insertion of the fence covenant in the deed, and promised to observe it if it were struck out, to which the attorney consented, and delivered the deed. The receivers built the fences as provided in the covenant, and also issued the pass to the grantor annually as long as they had control of the road. After the receivers had been relieved, and the re-organized company had taken possession of the road, they refused to keep the fence covenant or to deliver the annual pass to the grantor. On demurrer to the grantor's bill for specific performance—*Held*, that the deed might be reformed by inserting the covenant to build and maintain the fences, but that the complainant is entitled to no relief as to the annual pass; since no covenant on that head was in the deed, and the receivers had no power to bind their successors by such an agreement.

Bill to reform deed and for specific performance. On general demurrer.

Mr. J. W. Taylor, for demurrant.

Mr. L. Cochran, for complainant.

THE CHANCELLOR.

This suit is brought to reform a deed of conveyance given by the complainant to the receivers, for the creditors and stockholders of the New Jersey Midland Railway Company. The receivers have been relieved from their duties, and the property of the company restored to it, and the name of the company has been changed, and the company has been consolidated with other companies into a corporation by the name of the New York,

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Susquehanna and Western Railroad Company, which last-mentioned company now owns the Midland road. The bill states that in a settlement between the receivers and the complainant of a claim which the latter had in suit in this court against the Midland company, for the specific performance of an agreement made in settlement of his claim against the company, for land taken by it from him on proceedings for condemnation, it was agreed between the parties that, in consideration of the payment to him of certain moneys, and giving to him a free pass for himself over the railroad for life, and the undertaking on the part of the company to build and maintain fences on the line on each side of the land taken from him, the complainant would convey the land condemned, and an additional quantity agreed upon between them; that the complainant, in execution of his part of the agreement, caused the deed for the land to be drawn, and with his wife executed it; that it contained, when it was so executed, a covenant on the part of the grantees, the receivers, that they, and their successors and assigns, should build and maintain good and sufficient fencing between the lands described in the deed and conveyed thereby, and the complainant's other lands adjoining thereto; that he delivered the deed to his attorney, in order that the latter might close up the matter for him by delivering the deed to the receivers on receipt of the money agreed to be paid, and of the free pass; that the attorney presented the deed to the receivers, and they said that they preferred not to issue a life pass to the complainant, but that they, and their successors and assigns, would issue to him an annual pass over the railroad and would renew it at the end of each year during his life, and that if the deed was delivered to them they would, in consideration thereof, agree that such passes should be so issued to him; that they also said they preferred that the covenant contained in the deed to build and maintain the fences should not be there, and requested that it be erased, and said that if it were erased it should be equally binding on them and their successors in all respects as if it had been permitted to remain, and that they would, in consideration of the delivery of the deed, agree that they and their successors would build and maintain the

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fences. The bill further states that the complainant's attorney, confiding in the integrity and good faith of the receivers, and believing that if the parties to the deed should agree that the agreement for the pass and fences should be binding, it would, though not in the deed, be as enforceable against the receivers and their successors and assigns as if it were there, it was then agreed between him and the receivers that the deed did not show the whole of the contract, and that in consideration of the delivery of the deed the receivers and their successors would give the pass and build and maintain the fences, and he thereupon struck out the covenant, and on receiving the money agreed to be paid on the settlement delivered the deed; and the bill further states that the complainant subsequently discontinued his suit for specific performance. It also alleges that if the agreement is not now binding, that fact is due to the mutual mistake of the parties. It also states that the receivers observed the agreement while they were in office—building the fences and furnishing the pass annually—but that the defendants refuse to observe it. It prays specific performance and the rectification of the deed by the insertion of the covenant therein.

It will be seen that the mistake which the court is asked to correct occurred through the confidence of the complainant's attorney in the receivers, and the supposition on the part of both him and them that the erasing of the covenant would in no wise affect the complainant's rights. The mistake was not in omitting to insert a covenant, but in striking one out of the deed after it had been executed by the complainant. And the striking out was done not by the complainant, but by his attorney, in his absence and without his knowledge or consent. And it was done on the assurance of the grantees that the covenant would have equally binding effect if it were not contained in the deed as if it were. "If a man," says Mr. Kerr, "through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited

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by the mistake cannot in conscience retain the benefit or advantage so acquired." *Kerr on F. & M.* 398. The principle thus enunciated was recognized and applied in *Green v. M. & E. R. R. Co.*, 1 *Beas.* 165 (a suit very similar to this), where a grantor signed a deed for land to a railroad company for its road, without a reservation of certain rights (to a wagon-way over the railroad), on the assurance of the grantee's attorney that the right would not be affected by the instrument. The principle is applicable here, so far as the covenant (which, it is to be remarked, was only as to the fence) is concerned, but not to the agreement for a pass. That was not contained in the deed. It appears by the bill to have been a mere verbal agreement by the receivers, so far as they themselves were concerned, and a mere verbal assurance, so far as their successors were concerned, that they and their successors would issue to the complainant an annual free pass each year during his life, with which agreement and assurance the complainant's attorney was satisfied and relinquished the claim to receive then a free life pass as a part of the consideration of the deed. The receivers could not make an agreement for a free life pass which would bind subsequent owners of the railroad. As to the agreement for fencing as part of the consideration of the deed, the case is different. The demurrer is too extensive. It will therefore be overruled, with costs.

THE PENNSYLVANIA AND NEW ENGLAND R. R. Co.

v.

WILLIAM RYERSON et al.

A railroad company, the complainants, had located their line over part of defendant's farm, but needed more of defendant's land for a depot &c. The defendant refused to sell the quantity required, but offered to sell the whole farm. The complainants, prohibited by their charter from buying any more land than was actually necessary for railroad purposes, engaged one Lewis to

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buy the whole farm, and advanced the money to him for that purpose, under an agreement that Lewis should convey so much of the farm to the complainants as they required, and the remainder of the farm to one Babbitt. Lewis thereupon agreed orally with the defendant to buy the whole farm (the defendant, as the bill alleges, being cognizant of the whole transaction), and the written agreement therefor was to be signed and the deed delivered in ten days, the defendant being then absent. Lewis took possession of the whole farm at once, and delivered to complainants possession of the part they needed. Afterwards defendant refused to convey the farm to Lewis. On a bill for a specific performance filed by the complainants to compel defendant to convey the whole farm to Lewis, or so much thereof as complainants need, to them—*Held*, that Lewis was a necessary party to the suit, but Babbitt was not.

Bill for specific performance. On demurrer. Submitted on briefs of counsel.

Mr. J. W. Taylor, for demurrants.

Mr. L. Cochran, for complainant.

THE CHANCELLOR.

The demurrer states two grounds—want of necessary parties and want of equity. The bill is for specific performance of an oral agreement made, as alleged by the complainants, with one Samuel E. Lewis, for the sale and conveyance to him of a farm in Sussex county. The bill states that the complainant had located its railroad over land of William Ryerson; that it became necessary for it to have not only a right of way over that land, but also part of an adjoining tract owned also by him, for its use for a depot and other necessary purposes in connection with the construction and use of its railroad; that to obtain the needed land for all those purposes it applied for it to him and his agent, Thomas Ryerson, who, according to the bill, claims to have some interest in or control over the property; that the Ryersons were unwilling to sell the quantity of land which the company wanted to buy, but were willing to sell the whole farm; that the company, being prohibited by law from buying any more of the property than was necessary for railroad purposes, made an arrangement with Samuel E. Lewis to buy the whole

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stated, manifest that the bill cannot be maintained for want of Lewis as a party. He contracted in his own name, and where an agent contracts in that way both he and his principal must be parties to a suit for specific performance. *Fry on Spec. Perf.* § 148; *Pom. on Con.* § 485; *Nichols v. Williams*, 7 C. E. Gr. 63; *Cope v. Parry*, 2 J. & W. 538. Persons are necessary parties where no decree can be made respecting the subject matter of litigation until they are before the court either as complainants or defendants; or where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without those parties. *Bailey v. Inglee*, 2 Paige 278. Here the seller clearly has the right to have Lewis made a party. But Babbitt is not a necessary or proper party. The demurrer will be sustained.

GEORGE A. ABER, assignee in bankruptcy,

v.

WILLIAM W. BRANT et ux.

That part of the purchase-money of a lot of land was paid by a husband with his wife's money, and that his father gave her a part of the materials afterwards used in erecting a house on the lot, is not a sufficient consideration to uphold a voluntary conveyance of the house and lot by the husband to the wife as against his creditors, whose debts were nearly all contracted before the date of the conveyance.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. W. W. Cutler, for complainant.

THE CHANCELLOR.

The complainant, assignee in bankruptcy of William C. and Enoch T. Caskey, on August 20th, 1881, recovered a judgment for

Aber v. Brant.

\$121.27 against the defendant, William W. Brant, in the court for the trial of small causes of Morris county. The judgment was docketed in the court of common pleas of that county on September 15th, 1881, and execution against goods and lands was issued out of that court on the judgment on the same day, which writ (the sheriff being unable to find any goods) was returned with a levy on a lot of land in Morristown. That property was conveyed to Brant by deed dated April 1st, 1869. It was then a vacant lot. Brant, soon after he became the owner of it, built a house on it, in which he has lived ever since. The price of the lot was \$600, of which he paid \$200 in cash and gave a mortgage, still unpaid, for the rest. Of the complainant's debt, \$68.62 were contracted between October 15th, 1875, and December 30th following. On the latter day Brant conveyed the lot to Sarah A. Lindsley, who immediately conveyed it to Brant's wife. There was no consideration for either of those deeds, but they were made merely to transfer the title from Brant to his wife. The complainant, alleging that that transfer was a merely voluntary conveyance and fraudulent as against his claim, seeks by this suit to subject the property to the payment of his judgment. The defendants, by their answer, set up two defences: one that Brant was, when he made the conveyance, possessed of sufficient property, irrespective of the house and lot in question, to pay all his debts; the other that the lot was bought for his wife and the \$200 of the price paid with her money, and that to a great extent the improvements on the property were made with money given to her for the purpose by Elam R. Brant, her husband's father. The proof is that the lot was bought by William W. Brant and conveyed to him. The \$200 paid on account of the purchase-money were paid by him with his wife's money. He put the improvements on the property. Some of the materials for building the house came from his father, but the latter gave her no money. If those materials were a gift at all they were a gift to Brant. The title to the property stood in his name from April, 1869, to December 30th, 1875, when it was transferred to his wife. All of the complainant's debt except \$10 had then been contracted. The conveyance being volun-

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tary was, as to the part of the debt then contracted, void. And it was void as to the rest also, for it evidently was made merely for the purpose of placing the property beyond the reach of Brant's creditors. It will be declared fraudulent as against the complainant's debt.

JAMES W. FIELD

v.

THE INHABITANTS OF THE TOWNSHIP OF WEST ORANGE, &c.

A municipal corporation may be enjoined from discharging the water-drainage from the gutters of its streets on private lands in such quantities as to impair the value and use of those lands.

Bill for relief. On general demurrer.

Mr. J. W. Taylor, for the demurrants.

Messrs. J. W. & J. K. Field, for complainant.

THE CHANCELLOR.

The bill is filed for an injunction to restrain the defendants from continuing to discharge the drainage of certain streets on the complainant's land, to his injury. Part of the drainage is discharged on low land in the neighborhood of his land, and part into a private ditch or drain running through his land and the low land just mentioned. By means of the discharge of the drainage on the low land and into the ditch, the complainant's land is at times overflowed, and thus irremediable damage is done him. The overflow submerges his land, which otherwise would be drained by the ditch, and it injuriously affects his other property in the immediate vicinity by the large quantities of stagnant water which are thus collected and left there. When

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the complainant purchased his property through which the ditch runs (which was in 1873), none of the water from the streets in question was discharged into the drain, but it all passed off along the streets into two natural water-courses. Since then, and from a time shortly after the complainant bought his land through which the ditch runs, the defendants have caused the drainage to be, as before stated, discharged upon the low land and into the drain at complainant's land by new channels created by themselves for the purpose. They insist that they have the right thus to dispose of the water from the streets in the exercise of their municipal authority to regulate and grade the streets in question. But, in the first place, it does not appear, for it is not so stated in the bill, that the diversion complained of was made in the grading or other regulation of the streets. Assuming, however, that it was caused by the alteration of the grade, or in the regulation of the streets, it is quite clear that the defendants have no right to collect the water from the streets in a body and discharge it on the complainant's land to his damage, or in the private drain running through it, or on property adjacent to his, to the injury of his property. The cases on which they rely are *Bowlsby v. Speer*, 2 Vr. 351, and *Town of Union ads. Durkes*, 9 Vr. 21. But those cases do not support their claim. In the former—a suit between private persons—it was held that the diversion of surface-water to the injury of another's land was not an actionable grievance, and in the latter, that where damage is done in that way by the grading of streets, under competent authority, there is no responsibility to the injured party. The injury complained of in this case is not the result of grading or regulating the streets, but is occasioned by the act of the municipal authorities in giving a new direction to the water from the streets, for the purpose of conducting part of it to the low lands near the complainant's property, and the rest to the private drain on his land. And though, by our law, there is no redress for the injury done by the diversion of surface-water in the grading or regulation of streets, the doctrine cannot be applied so as to give license to municipal authorities to discharge the waters of streets on private property, thus condemning it to the use of the

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public without compensation. Such an application of the doctrine would not only be unreasonable, but would sanction flagrant and manifest injustice. A land-owner has no right to cause, by means of artificial trenches or otherwise, the natural mode of discharge of surface-water from his land on that of his neighbor to be changed to the injury of the land of the latter, by conducting it by new channels in unusual quantities to or on a particular part or parts of the latter's land. *Washb. on Easements* 353; *Ang. on Water-Courses* 108; *Bellows v. Sackett*, 15 Barb. 96; *Foot v. Bronson*, 4 Lans. 47. He has no right, for example, to build a house on his land and collect the rainfall in a gutter on it and discharge it by a spout on his neighbor's land.

In *Foot v. Bronson*, where the defendants, to relieve their land from surface-water, deepened a ditch on the highway, and thus caused an increased and unnatural flow of water through the surface-drains of adjacent owners, to the injury of their land, it was held that a mandatory injunction should issue to compel the defendants to fill up the ditch to its former level, and to restrain them from lowering it again. The principle is applicable to municipal authorities charged with the duty of regulating streets. The law on that subject is well stated by Judge Dillon as follows: "Authority to establish grades for streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground which may affect injuriously the adjacent property-owners; but where the power is not exceeded there is no liability, unless created by statute, and then only in the mode and to the extent provided, for the consequences resulting from its being exercised and properly carried into execution. On the one hand, the owner of the property may take such measures as he deems expedient to keep surface-water off from him, or turn it away from his premises on to the street, and, on the other hand, the municipal authorities may exercise their powers in respect to the graduation, improvement and repair of streets without being liable for the consequential damages caused by surface-water to adjacent property." *Dill. on Mun. Corp.* § 798. The same learned and judicious author withholds his assent from the doctrine that corporate authorities,

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by reason of their control over streets and their power to grade and improve them, have the legal right intentionally to divert the water therefrom to protect the streets and discharge it on the land of an adjacent proprietor, it may be to its destruction. *Id.* § 799. The land-owner is indeed compelled to bear (if he cannot himself protect his property against them) the consequences naturally flowing from grading and regulating the streets, but he is not compelled to submit to the destruction or injury of his land by the intentional diversion of the water from the streets to and on his property for the benefit of the public. The municipal authorities have no right to single him out to bear, without compensation therefor, a public burden to the relief of the property of his neighbors. The gross injustice of the contrary doctrine is so palpable as to render further remark superfluous. In the case in hand, however, as before stated, it does not appear that the injury complained of is due to the action of the defendants in grading or regulating the streets. Nor does it appear that they had any authority of any kind for their action. The demurrer will be overruled.

FRANCIS T. COOPER et al.

v.

RALPH V. M. COOPER, JR.

A testator directed that the defendant's share of his *personal* estate should be retained in the hands of his trustees, and the income thereof be appropriated to the defendant's support and maintenance, at their discretion. He further directed that defendant's share of his *real estate* should continue to be held in trust and the income alone thereof appropriated as he had previously directed in the case of defendant's share of the personal estate. On partition sale of testator's real estate—*Held*, that defendant's share of the proceeds must be retained by the trustees, and the defendant receive only the income thereof during his lifetime.

Cooper v. Cooper.

Bill for partition. Answer in nature of cross-bill. On final hearing.

Mr. John F. Joline, for complainants.

Mr. H. A. Drake, for defendant.

THE CHANCELLOR.

This is a suit for partition, and the question presented is whether the defendant is entitled to a decree directing that the proceeds of the sale of one-sixth of the land, in respect to his interest in which he is made a party, be paid over to him. The parties claim title under the will of Dr. Joseph Fifield. By the will, the testator devised all his real estate to his trustees for the purposes of the will, as thereafter set forth. By a subsequent clause of the will, he directed his trustees, when his youngest grandchild should reach majority, to convey all his real estate, except certain ground rents, to all the children of his daughter Louisa, except one whom he names, and for whom he had otherwise provided, and the issue of such as might be dead leaving issue, in equal shares as tenants in common; the issue of any deceased child to take the share which the parent would have taken if living, except the share of his grandson, Ralph V. M. Cooper (the defendant), which should continue to be held in trust as before provided and the income alone thereof appropriated as he had previously directed in the case of his share of the personal estate. The direction referred to is that the share (of personal estate) shall be retained in the hands of the trustees, and the income thereof be appropriated to the defendant's support and maintenance, at their discretion. There is no further provision in reference to the defendant's share of or interest in the real estate. The defendant insists that the trust is a dry one; that he is the equitable owner of the fee of the share, and that as the trust is to appropriate the income to his benefit he is entitled to have the proceeds of the sale of the share under the proceedings for partition paid to him. He seeks to nullify the

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trust. The principles which govern the subject are familiar elementary law. A simple trust is where the property is vested in one person in trust for another, and the nature of the trust not being qualified by the settlor is left to the construction of the law. In this case, the *cestui que trust* has *jus habendi*, or the right to be put in actual possession of the property, and *jus disponendi*, or the right to call on the trustees to execute conveyances of the legal estate as the *cestui que trust* directs. A special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as in a simple trust, a mere passive depository of the estate, but is called upon to exert himself in the execution of the settlor's intention. *Lewin on Trusts* 21. The trust under consideration is not a simple but a special one. Under a simple trust the *cestui que trust* has the right to immediate possession, but under a special trust he can only enforce in equity the intention of the settlor to the extent of his interest. The trust here is to hold the share and collect the income and appropriate it, at the discretion of the trustees, to the support and maintenance of the defendant. The trust is an active one. It involves confidence, discretion and active duties. *Hardenburgh v. Blair*, 3 *Stew. Eq.* 645; *Force v. Brown*, 5 *Stew. Eq.* 118. The title to the share is in the surviving trustee, and the defendant is in equity entitled to the benefit of the income (but only to that) for his life. The will gives him the benefit of that alone. It directs that the income "alone" shall be appropriated to his support, and that the trustees shall continue to hold the share. The proceeds of the sale of the share will be held by the surviving trustee in place of the share and on the same trust.

Lewis v. Cranmer.

ALFRED LEWIS

v.

REUBEN S. CRANMER et al.

An answer to a bill to enforce a vendor's lien for purchase-money set up that the complainant was not, when he made the conveyance, seized of the property, and was not the owner of part of it; and further, that it was understood that an account between one of the grantees and the complainant should be offset against so much of the purchase-money. On objection to those points of the answer, it was ordered that they be stricken out because the amount did not allege fraud or mistake, or that the deed contained covenants of title; nor that it was agreed that the specified claims should be a set-off.

Bill to enforce vendor's lien for purchase-money. On motion to strike out parts of the answer.

Mr. I. W. Carmichael, for complainant.

Mr. J. C. Hendrickson, for defendants.

THE CHANCELLOR.

The bill alleges that the complainant sold and conveyed to two of the defendants certain land in Ocean county, and that he has not received the whole of the purchase-money, and it prays that he may be decreed to have a lien on the property for so much of the purchase-money as remains unpaid. The answer denies the complainant's right to the lien on the ground that he was not, when he made the conveyance, seized of the property, and was not the owner of part of it—fifteen acres—and it claims an offset of a debt due one of the grantees from the complainant.

In a proper case a defendant sued for a vendor's lien may set up by his responsive answer, by way of defence, the fraud of his vendor in the sale, or their mutual mistake. *Dayton v. Mellick*, 12 C. E. Gr. 362; S. C., 7 Stew. Eq. 245, 249. But neither fraud nor mistake is alleged here. Not only so, but it does not

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even appear that the deed had any covenants whatever in it, express or implied; nor does it appear that it was not a mere deed of bargain and sale without covenants of any kind. As to the claim of offset, the answer alleges that "it was understood" that "an account" (it appears to be a bill of goods sold by one of the grantees to the grantor) existing between the complainant and the grantor should be an offset to so much of the purchase-money. It is not alleged that it was agreed that the claim should be an offset, nor by whom it was understood that it should be so. The parts of the answer objected to will be struck out, with costs of the motion.

WILLIAM SHERMAN

v.

LEAH SHERMAN et al.

A testator directed all of his estate to be sold, and the proceeds divided into six shares, which were to be given to his brothers and sisters, "the shares * * * to be paid to them *on their own responsibility*, and they to use it during their natural life, and at their decease the said principal so paid to them to be divided among their lawful heirs, share and share alike." One of the sisters threatening to dispose of her share in order to defeat her son's interest therein, it was *held* that she might be enjoined from so doing, and required to give security for the protection of the remaindermen.

Bill for relief. On order to show cause why an injunction should not issue. On bill and affidavits.

Mr. C. A. Skillman, for complainant.

Mr. R. S. Kuhl, for defendants.

THE CHANCELLOR.

The suit is brought to restrain Leah Sherman from disposing

Sherman v. Sherman.

of the money received by her under the will of her brother, James Maxwell, deceased, and from disposing of or encumbering a house and lot in which she has invested part of the money, until she shall have secured the fund against waste by her. The complainant is one of her three children. According to the bill, she, in order to prevent him from obtaining any part of the fund at her death, threatens to dispose of the whole of it. The question involved in the controversy is whether, by legal construction of the bequest under which she received the fund, Mrs. Sherman does or does not possess an absolute property in the fund. By the fifth section of the will the testator directs that the person who shall administer his estate (he appointed no executor) sell and convey all his estate, both real and personal, and, after payment of the legacies previously given, divide the residue into six shares, of which he gives to his brothers, William and Henry, and his sisters, Leah, Ann and Mary, each one share, and he then proceeds as follows:

"The shares of my brothers, Henry and William, and of my sisters, Leah Sherman, Ann Martin and Mary Lair, each are to be paid to them on their own responsibility, and they to use it during their natural life, and at their decease the said principal so paid to them to be divided among their lawful heirs, share and share alike."

Mrs. Sherman's share of the residue is the fund in question. The construction of the bequest under consideration presents no difficulty. Mrs. Sherman is to have the use of the fund for life, and at her death the principal is to go to her lawful heirs in equal shares. That is a gift to her of the interest or income of the fund for life, and of the principal of the fund to her children at her death. *Rev. p. 299 § 10 ; Akers v. Akers, 8 C. E. Gr. 26 ; Jones v. Stites, 4 C. E. Gr. 324 ; Demarest v. Hopper, 2 Zab. 599.*

The provision that the principal shall go to her heirs after her death conclusively disposes of her claim to absolute ownership of the fund. By the direction that the fund should be paid over to her "on her own responsibility," the testator intended that she should be entitled to receive the fund without giving security

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therefor. She threatens to dispose of the fund expressly with a view to depriving the complainant, whose interest in it she denies, from ever receiving any of it, and she has already disposed of part of it. She may, under such circumstances, be required to give security for the fund, in equity, and she should be restrained from disposing of it until she does so. *Rowe v. White*, 1 C. E. Gr. 411. The order to show cause will be made absolute.

FRANK L. INGERSOLL, executor &c.,

v.

MARGARET INGERSOLL et al

A testator gave to his wife certain legacies for life, and then provided: "It is my wish that my wife, Margaret, shall have the privilege of occupying so much of the house in which I now live as she may need, during the time she remains my widow." He then gave his residuary estate to his son. The house stood on an ordinary town lot.—*Held*, that the fee of the house and lot passed to the son under the residuary devise, subject to the right of the widow to occupy, *personally*, so much of the house as she might need, during her widowhood, including the use of the curtilage, in common with the occupants of the remaining parts of the house.

Bill for construction of will.

Mr. A. R. Shay, for complainant.

Mr. J. M. Robeson, for defendants.

THE CHANCELLOR.

William S. Ingersoll, by his will, after providing for payment of his debts and funeral expenses, gave to his wife \$1,000, and directed his executor to put \$1,000 at interest, and pay her the interest for life; the principal, after her death, to go to any child or children she might have by the testator, and if, at her

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death, she should leave no such child or children, in that case he gave the principal to his son Frank. He then gave her the use of his household goods so long as she should remain his widow, and added :

“ It is my wish that my wife, Margaret, shall have the privilege of occupying so much of the house in which I now live as she may need, during the time she remains my widow.”

He then gave pecuniary legacies to his daughters by his first wife, and to his grandson and granddaughter, and then gave all the rest and residue of his property, of whatever description, not thereinbefore disposed of, to his son Frank, whom he appointed sole executor.

NOTE.—What words in a conditional devise require the beneficiary to reside on the premises, *Casper v. Walker*, 6 *Stew. Eq.* 37, note; *Parker v. Parker*, 126 *Mass.* 433; *Tilden v. Tilden*, 13 *Gray* 103; see *Conkey v. Everett*, 11 *Gray* 95. The rents and profits of a house, which have been received by a devisee without her residing thereon during her lifetime, as required by the devise to her, may be recovered from her executors, *Gardener v. Wagner*, *Bald. C. C.* 454.

In case of ambiguity, the number of the lot in question may be resorted to in applying a will or deed to the subject matter, but may be overcome by other particulars, *Buchanan v. Stewart*, 3 *Hurr. & Johns.* 329; *Harmer v. Gurner*, 35 *Beav.* 478; *Dikeman v. Taylor*, 24 *Conn.* 219; *Hall v. Hall*, 7 *Fost.* 275; *Quin v. Hunt*, 41 *Ind.* 466; *Lush v. Druse*, 4 *Wend.* 313; *Jackson v. Loomis*, 13 *Johns.* 81, 19 *Johns.* 449; *Warner v. Miltenburger*, 21 *Md.* 264; *Anderson v. Baughman*, 7 *Mich.* 69.

Also the time of purchase and name of the vendor, *Griscom v. Evens*, 11 *Vr.* 402; *Perry v. Morgan*, 1 *Strobh.* 8; *Doe v. Lyfford*, 4 *M. & S.* 550; *Proctor v. Pool*, 4 *Dev.* 374; *Wing v. Burgis*, 13 *Me.* 111; *Douglas v. Blackford*, 7 *Mo.* 8; *Young v. Twigg*, 27 *Md.* 620; *Lendrick v. Russell*, 10 *Irish Eq.* 269.

Also the use and occupation thereof, *Holton ads. White*, 3 *Zab.* 330; *Bradshaw v. Ellis*, 2 *Dev. & Bat. Eq.* 20; *Stowe v. Davis*, 10 *Ired.* 431; *Kincaid v. Lowe*, *Phil. (N. C.) Eq.* 41; *McLennan v. Chisholm*, 66 *N. C.* 100; *Whitfield v. Langdale*, *L. R. (16 Eq.)* 61; *Streeter v. Streeter*, 43 *Ill.* 155; *Goodtitle v. Southern*, 1 *M. & S.* 299; *Marshall v. Hopkins*, 15 *East* 309; *Smith v. Galloway*, 5 *B. & Ad.* 43; *Doe v. Parkins*, 5 *Taunt.* 321; *Hubbard v. Hubbard*, 15 *Ad. & El. (N. S.)* 227; *Hardwick v. Hardwick*, *L. R. (16 Eq.)* 168; *Brown v. Sultonstall*, 3 *Metc. (Mass.)* 423; *Chamberlaine v. Turner*, *Oro. Car.* 129; *Down v. Down*, 7 *Taunt.* 343; *Homer v. Homer*, *L. R. (8 Ch. Div.)* 758; *Winchester v. Hees*, 35 *N. H.* 43; *Perkins v. Jewett*, 11 *Allen* 9; *Wooton v. Redd*, 12 *Gratt.* 196; *Venable v. McDonald*, 4 *Dana* 336; *Harrison v. Hyde*, 4 *H. & N.*

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The questions presented for decision are, What is the interest of the widow, under the will, in the house; whether it is such that she may lease or otherwise dispose of her right therein to a stranger; whether she has any right in the curtilage (the lot is a town lot in Newton), and whether the fee of the house and lot passes, under the residuary clause, to Frank.

The fee of the house and lot passes by the residuary devise to Frank, subject to the right of his stepmother, the widow, to oc-

805; *Bodenham v. Pritchard*, 2 D. & R. 508; *Harris v. Harris*, 1 Metc. (Mass.) 400; *Brown v. Brown*, 43 N. H. 17; *Bishop v. Morgan*, 82 Ill. 351; *Jack v. McIntyre*, 12 Cl. & Fin. 151.

Also, the improvements or enclosures, *Richmond v. State*, 5 Ind. 334; *Jones v. Norfleet*, 7 Jones 473; *McElrath v. Haley*, 48 Ga. 641; *O'Connor v. O'Connor*, L. R. (4 Irish Eq.) 483; *Adams v. Morrow*, 42 Md. 434; *Bodenham v. Pritchard*, 2 D. & R. 508; *Goodright v. Pears*, 11 East 58; *Goodtitle v. Paul*, 2 Burr. 1089; *Griffith v. Penson*, 9 Jur. (N. S.) 383.

Also, the designation, *McCoury v. King*, 3 Humph. 267; *Perry v. Morgan*, 1 Stroob. 8; *Doe v. Lyfford*, 4 M. & S. 550; *Doe v. Roe*, 1 Wend. 541; *Breeding v. Taylor*, 13 B. Mon. 487; *Winkley v. Kaime*, 32 N. H. 268; *Nourse v. Lloyd*, 1 Pa. St. 229; *Webber v. Stanley*, 16 C. B. (N. S.) 698; *Mundell v. Hugh*, 2 Gill & Johns. 206; *Whitfield v. Langdale*, L. R. (1 Ch. Div.) 61; *Dorsey v. Hammond*, 1 Harr. & Johns. 190; *Chapman v. Bennett*, 2 Leigh 329; *Seaman v. Hogeboom*, 21 Barb. 398; *Walston v. White*, 5 Md. 297; *Hall v. Hall*, 7 Fost. 275; *Plunkett's Case*, 11 Irish Ch. 361; *Allen v. Lyons*, 2 Wash. C. C. 475; *Hartt v. Rector*, 13 Mo. 497; *Pegram v. Newman*, 54 Miss. 612; see, however, *Miller v. Travers*, 8 Bing. 244; *Kurtz v. Hibner*, 55 Ill. 514; *Fitzpatrick v. Fitzpatrick*, 36 Iowa 674; *Barber v. Wood*, L. R. (4 Ch. Div.) 885; *Am. Bible Soc. v. Pratt*, 9 Allen 109; *Hall v. Fisher*, 1 Coll. 47; *Dunning v. Cranston*, 7 M. & W. 1; *Day v. Trigg*, 1 P. Wms. 286; *Bryce v. Lorillard Ins. Co.*, 49 How. Pr. 498; *Sargent v. Adams*, 3 Gray 72.

Also, the quantity, *Bear v. Bear*, 13 Pa. St. 529; *Taylor v. Seely*, 1 Phila. 341; *Wooton v. Redd*, 12 Gratt. 196; *Reddick v. Leggett*, 3 Murph. 539; *Lewis v. Singleton*, 1 A. K. Marsh. 523; *Gibbes v. Elliott*, 5 Rich. Eq. 327; *Coleman v. Eberly*, 76 Pa. St. 197; *Doe v. Meyrick*, 2 Cr. & J. 223; *Whitfield v. Langdale*, L. R. (1 Ch. Div.) 61; *Warren v. Cogswell*, 10 Gray 76; *Melcher v. Chase*, 105 Mass. 125.

Also, the boundaries, as rivers, streets, roads &c., *Middleton ads. Perry*, 2 Bay 539; *Milliken v. Bailey*, 61 Me. 316; *Mayo v. Blount*, 1 Ired. 283; *Bosworth v. Danzien*, 25 Cal. 296; *Glenn v. Malony*, 4 Iowa 317; *Am. Ins. Co. v. McLanathan*, 11 Kan. 533; *Delaspere v. Warner*, 14 La. Ann. 413.

Parol evidence is admissible to show what a testator regarded as his "estate," "plantation" &c., *Ricketts v. Turquand*, 1 H. of L. Cas. 472; *Beach*

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cupy so much of the house (according to the language of the will) as she may need, during her widowhood. Her right is a personal one. Under the gift of the free use and occupation of a house, the donee is not confined to a personal use, so that he is debarred from letting the property during the continuance of his interest. *King v. Ealington*, 4 T. R. 177; *Rabbeth v. Squire*, 4 De G. & J. 406. But it is a question of intention, and if it appears, from the terms of the gift or the context of the will, that a personal use only was intended, the enjoyment of the

v. *Earl of Jersey*, 3 B. & C. 870, 1 B. & Ald. 550; *Webb v. Byng*, 1 K. & J. 580; *Stanley v. Stanley*, 2 Johns. & Hem. 491; *Gore v. Langton*, 3 B. & Ad. 680; *Richardson v. Watson*, 4 B. & Ad. 787; *Harrison v. Hyde*, 4 H. & N. 805; *Homer v. Homer*, L. R. (8 Ch. App.) 758; *Boggs v. Taylor*, 26 Ohio St. 604; *Wilson ads. Robertson*, Harp. Eq. 56; *McElrath v. Huley*, 48 Ga. 641; *Wusthoff v. Dracourt*, 3 Watts 243; *Vernon v. Henry*, 3 Watts 385; *Clererly v. Cleverly*, 124 Mass. 314; *Venable v. McDonald*, 4 Dana 336.

A house, in a prohibitory building covenant in a deed, means a dwelling-house, *Schenck v. Campbell*, 11 Abb. Pr. 292; see *State v. Garity*, 46 N. H. 61; *State v. Powers*, 36 Conn. 77; *Com. v. Posey*, 4 Call 109; and must be exclusively occupied as a dwelling, *Hill v. Hibernia Ins. Co.*, 10 Hun 26; *New York Fire Dep. v. Buhler*, 33 How. Pr. 378, 34 N. Y. 177; 1 *Dillon's Mun. Corp.* § 405; *Gasner v. Met. Ins. Co.*, 13 Minn. 433; see *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133; *Gorunlock v. Manf. Ins. Co.*, 43 U. C. Q. B. 563; *Vincent's Case*, 26 Ala. 145; *Hermann v. Merchants' Ins. Co.*, 81 N. Y. 184.

A billiard-room attached to a tavern may be considered part of a dwelling, *Rogers v. Troth*, 7 Vr. 422; see *Lammer's Case*, 14 Bank. Reg. 460.

An insurance risk described by the applicant as a stone dwelling-house, includes a wooden kitchen attached thereto, *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; see *Gerhauser v. North British Ins. Co.*, 7 Nev. 174; *Oliver v. Dickinson*, 100 Mass. 114.

A "dwelling" may mean only one room therein, in which the applicant lived, *Friedlander v. London Ass. Co.*, 1 Moo. & R. 171; see *Dale v. State*, 27 Ala. 31; *O'Brien v. State*, 10 Tex. App. 544; *Com. v. Bullman*, 118 Mass. 456; *Com. v. Intoxicating Liquors*, 122 Mass. 8.

A householder may be one who occupies two or three rooms exclusively, and the rest of the house in common with his father-in-law's family, *Griffin v. State*, 18 Ohio St. 438; *Bowne v. Witte*, 19 Wend. 475; see *Aaron v. State*, 37 Ala. 106; *Bradford v. State*, 15 Ind. 353; *Markham v. State*, 25 Ga. 52; *Calhoun v. Williams*, 32 Gratt. 18; *Rodgers v. People*, 86 N. Y. 360.

A "house" may include a church, *Folkestone v. Woodward*, L. R. (15 Eq.) 159.

How much land may be embraced under condemnation of a "house" by a railroad company, *King v. Wycombe R. R.*, 28 Beav. 104; *Mason v. London R. R.*, L. R. (6 Eq.) 101; *Steele v. Midland R. R.*, L. R. (1 Ch. App.) 275;

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gift will be confined accordingly. As in *Maclaren v. Stainton*, 4 Jur. (N. S.) 199, where there was a gift over if the donee ceased to occupy the house, and in *Stone v. Parker*, 29 L. J. (Ch.) 874, where there was a direction to sell if the donee refused to occupy. The gift in the case, under consideration, is not of the right to occupy any definitely designated part of the house, but such part of it as the widow's personal convenience may require. This reference to her personal requirements is evidence that the testator contemplated a merely personal use, and so, indeed, are

see *Richards v. Swansea Co.*, L. R. (9 Ch. Div.) 425; *Chapman v. Royal Bank*, L. R. (7 Q. B. Div.) 136.

A "dwelling-house" and "messuage" are synonymous, *Applegate v. Applegate*, 1 Harr. 323; *Rogers v. Smith*, 4 Pa. St. 93; *Doe v. Collins*, 2 T. R. 502, Ashurst, J.

A warrant to search a dwelling-house does not include a barn, *Jones v. Fletcher*, 41 Me. 254; see *Stedman v. Crane*, 11 Metc. 295; *Pitcher v. People*, 6 Mich. 142.

A warrant to search a place occupied as a storehouse was held to include a dwelling, *Com. v. Intoxicating Liquors*, 122 Mass. 14.

A bark-house or tan-vat is not part of a dwelling-house, *State v. Stites*, 1 Green 176.

A grant of a mill was held to convey only the land on which it stood and that covered by the projecting eaves, *Blake v. Clark*, 6 Me. 436; see *Forbush v. Lombard*, 13 Metc. 109; *Millett v. Fowle*, 8 Cush. 150; and so of a lease of a "building," *Sherman v. Williams*, 113 Mass. 481; or apartments in a building, *Wood's Land. and Ten.* § 394; *Whitaker v. Hawley*, 25 Kan. 686.

An exemption of a house of public worship from taxation was held not to exempt the land on which it stood, *Lefevre v. Detroit*, 2 Mich. 586; see *Trinity Church v. Boston*, 118 Mass. 164.

A conveyance of "the academy with the fence around said building," conveys the land about the building and used in connection with it, *Snow v. Orleans*, 126 Mass. 453.

A curtilage or garden is parcel of a house and will pass under a devise of the house, *Carden v. Tuck*, Cro. Eliz. 89; 3 Leon. 214; *Keilw.* 57; *Smith v. Martin*, 2 Saund. 401, note; *Rogers v. Smith*, 4 Pa. St. 93; *Williams v. McComb*, 3 Ired. Eq. 451; *Ogden v. Jennings*, 62 N. Y. 530; *Griffin v. Ransdell*, 71 Ind. 442; or a devise of a barn, *Bennet v. Bittle*, 4 Rawle 339.

One devised that his cousin A should continue to live at his house, and be at the charge of keeping the house and the servants and the horses which testator had employed in plowing the ground, and to spend the corn raised thereon in the house.—Held, that the land on which the corn had usually been raised passed with the house, *Blackborn v. Edgeley*, 1 P. Wms. 603; see *Pinckney v. Pinckney*, 2 Rich. Eq. 218.

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the terms of the gift generally. The inclination of courts, in construing gifts of this character, is towards holding them to be estates, and that has quite uniformly been done where the gift was of the whole property or of a specified part, but, as before stated, it is a question of intention, and there are cases in which, under language such as that by which the gift in this case is expressed, they have held the gift to be a mere personal privilege. In *Kingman v. Kingman*, 121 Mass. 249, a testator by his will devised as follows:

A devised his brick house to B. The house was 78½x20 feet, and stood on the corner of a town lot 132x82½ feet.—*Held*, that the whole lot passed, *Richmond v. State*, 5 Ind. 334.

A testator gave to S. one-half of the house he lived in, in a town, and to J "the other half of this house I live in and the lot it is built upon, with other appurtenances thereunto belonging."—*Held*, that S. had one-half of the house and the ground that it was built upon, and that J. had the other half and all the remainder of the lot and appurtenances, *Williams v. McComb*, 3 Ired. Eq. 450; see *Cloyes v. Sweetser*, 4 Cush. 403.

Whether a devise of "fields," or a "farm," or "lands" will pass a dwelling *O'Connor v. O'Connor*, L. R. (4 Irish Eq.) 483; see *Burton v. Brown*, Cro Jac. 643; *Hay v. Cumberland*, 25 Barb. 594; *Streeter v. Streeter*, 43 Ill. 155.

What lands pass under a devise of testator's homestead, *Hopkins v. Grimes*, 14 Iowa 73; *Backus v. Chapman*, 111 Mass. 386.

Where testator devised "a lot of ground, lying on the east side of L. street, in Ridgley's Addition to Baltimore," evidence was admitted to show that testator meant by lot a larger parcel of ground than one of the town lots on Ridgley's plat, *Warner v. Milltenberger*, 21 Md. 264; see *McElrath v. Haley*, 48 Ga. 641; *Jones v. Norfleet*, 7 Jones 473; *Adams v. Morrow*, 42 Md. 434; *Benham v. Hendrickson*, 5 Stew. Eq. 441; *Edwards v. Derrickson*, 4 Dutch. 44, 45; *James v. Van Horn*, 10 Vr. 353.

A devise of lot No. 25, followed by a particular description of its boundaries, will pass all of the lot, although it contains more land than the description. *Buchanan v. Stewart*, 3 Harr. & Johns. 329; *Lush v. Druse*, 4 Wend. 313; see *Dikeman v. Taylor*, 24 Conn. 219; *Hall v. Hall*, 27 N. H. 275; *Gibbes v. Elliott*, 5 Rich. Eq. 327.

What passes under a devise of a corner lot, *Harman v. Gurner*, 35 Bear. 478; *Perkins v. Jewett*, 11 Allen 9; *Gibbes v. Elliott*, 5 Rich. Eq. 327.

A lease of "the Adams House, situate on Washington street, in Boston," may be shown, by parol, to mean only the hotel of that name, and not to include several stores under the same roof, *Sargent v. Adams*, 3 Gray 72; *Harris v. Dub*, 57 Ga. 77; *Corbett v. Costello*, 8 La. Ann. 427; see *Cleverly v. Cleverly*, 124 Mass. 314; *Jones v. Whelan*, 16 Irish C. L. 495; *Alger v. Kennedy*, 49 Vt. 109.—REP.

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"I give to my wife, Fanny Kingman, the use and improvement of all my part of the dwelling-house where we now reside, except the right and privilege therein which is hereinafter devised to my daughter Tempy. I give to my daughter Tempy the use and improvement of so much of my house as she may need during her life."

It was held that the daughter had a personal interest in the nature of an easement or servitude. And so, too, in *Maeck v. Nason*, 21 Vt. 115, where a testator gave his daughter the right "to live and remain in his house so long as she remained unmarried."

The gift of a house includes the curtilage also. And here the gift of the use and occupation of part of the house must reasonably be held to include the use of the curtilage in common with the occupant or occupants of the rest of the house.

FRANCES L. VAN HOUTEN

v.

WILLIAM E. PINE et al.

The widow of a member of a voluntary, mutual life insurance association, claiming that as such widow she was entitled to receive from the association \$1,000 insurance on the death of her husband, filed a bill against two defendants, one the president and the other the secretary and treasurer, to compel payment of the insurance-money from the funds in their hands, or that the court might compel them to raise the sum by an assessment of the members. The bill further alleged that the decedent had, on account of his illness and through the mistake of a director of the association, to whom he had given the money, failed to pay an assessment levied on him within the time limited by the by-laws, and that his name had been stricken from the association for that reason, and without serving upon him a second notice to make such payment, as required by the by-laws, before he could be removed. Demurrer overruled, and—*Held*,

(1) That as it did not appear from the bill that there would be any occasion to make an assessment (it appeared by a printed statement in a copy of the by-laws put in by the defendants on the argument of the demurrer, that the association was in possession of ample funds to pay the \$1,000), it was unneces-

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sary to decide whether the court had the power, in a proper case, to order an assessment to be levied on the members for such purpose.

(2) That the defendants were competent, as the officials of the association, to protect its rights, and that to require the joinder of all the members of the association as parties was impracticable and unnecessary.

(3) That impertinent matters might, under the two hundred and tenth rule, be struck out of the bill.

Bill for relief. On general demurrer.

Mr. Borchertling, for demurrants.

Mr. Hassell, for complainant.

THE CHANCELLOR.

The complainant, widow of James H. Van Houten, deceased, brings suit against an unincorporated society named The Masonic Mutual Life Insurance Company, of which her husband was, at one time, a member. The company is a voluntary association located in this state, and its object is, as its name imports, mutual life insurance. Its members are freemasons, of the de-

NOTE.—Courts of equity have jurisdiction over unincorporated, voluntary associations where pecuniary rights of the members are involved, *Thomas v. Ellmaker*, 1 Pars. Eq. 98; *Adley v. Whitstable Co.*, 17 Ves. 316; *Lyman v. Bonney*, 101 Mass. 562; *Olery v. Brown*, 51 How. Pr. 92; *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66; see *Dolan v. Court*, 128 Mass. 437; *Lamphere v. Grand Lodge*, 47 Mich. 429; *Babb v. Reid*, 5 Rawle 151; *Berry v. Cross*, 3 Sandf. Ch. 1.

The members are jointly and severally liable to pay benefits, *Protchett v. Schaefer*, 11 Phila. 166; *Payne v. Snow*, 12 Cush. 444; *Miller v. Georgia Masonic Co.*, 57 Ga. 221; *Henry v. Jackson*, 37 Vt. 431; but a mandamus to compel an assessment on the members will not lie, *Burland v. Mutual Ben. Assn.*, 47 Mich. 424.

Recourse to law cannot be had where no pecuniary rights are involved, *Thompson v. Soc. of Tammany*, 17 Hun 305; *White v. Brownell*, 2 Daly 329; *Bauer's Appeal (Pa.)*, 18 Alb. L. J. 213.

If the charter and by-laws provide a mode of expelling or suspending a member, the proceedings of the association, if in conformity therewith, are conclusive, *Com. v. Pike Soc.*, 8 Watts & Serg. 247; *Chamberlain v. Lincoln*, 129 Mass. 70; *Grosvenor v. United Soc.*, 118 Mass. 78; *Burton v. St. George's Soc.*, 28 Mich. 261; *Burt v. Grand Lodge*, 44 Mich. 208; *Society v. Com.*, 52

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gree of master mason. The maximum number of members is one thousand two hundred. On the death of a member, each surviving member is required to pay into the treasury, on ten days' notice, \$1. The by-laws provide for a second notice, if payment be not made on the first, in which case the delinquent is required to pay, instead of \$1, \$1.10; and in case of non-payment in ten days after the second notice, his name is to be erased from the roll of members, and he is to forfeit all claims on the company; but the board of directors may re-instate him, if he is apparently in good health, on his giving a satisfactory excuse for his default and paying all assessments up to the date of re-instatement. The treasurer is, within thirty days after notice of the decease of a member, to pay to the widow or family of the decedent, or to the person to whom the decedent may have directed payment to be made, \$1,000. According to the bill, Van Houten was a member of the company. Shortly before his death he received notice to pay an assessment, and six days from the time when he received the notice (he being then confined to his house by illness), he offered to pay the assessment to one of the directors, who then

Pa. St. 125; Troy Factory v. Corning, 45 Barb. 231; or, at least, must be exhausted before resorting to courts of law, Ellison v. Bignold, 2 Jac. & W. 503; Carlen v. Drury, 1 Ves. & B. 154; Lafoud v. Deems, 81 N. Y. 507; Olerly v. Brown, 51 How. Pr. 92; see Austin v. Searing, 16 N. Y. 112; Leech v. Harrie, 2 Brews. 571; Savannah Exchange v. State, 54 Ga. 668; Kelsall v. Tyler, 34 E. L. & Eq. 588.

If the association tribunals decide against a claim for benefits, the claimant cannot recover at law, *Torum v. Howard Assn., 4 Pa. St. 519; Anacosta Tribe v. Murbach, 13 Md. 91; Blacksmiths Soc. v. Van Dyke, 2 Whart. 390; Osceola Tribe v. Schmidt, 57 Md. 98; see Dolan v. Court, 128 Mass. 437.*

The provisions of the charter and by-laws of the association as to the manner in which the funds may be acquired or disposed of, bind the members, *Vollman's Appeal, 92 Pa. St. 50; St. Patrick's Soc. v. McVey, 92 Pa. St. 510; Breneman v. Franklin Assn., 3 Watts & Serg. 218; Folmer's Appeal, 87 Pa. St. 133; McCabe v. Father Matthew Soc., 24 Hun 149; Torrey v. Baker, 1 Allen 120; Fugure v. Mutual Soc., 46 Vt. 362; Weil v. Trafford, 3 Tenn. Ch. 108; McClure v. Johnson, 56 Iowa 62; Worley v. Northwestern Assn., 10 Fed. Rep. 227; Hyde v. Woods, 94 U. S. 523; Arthur v. Odd Fellows Assn., 29 Ohio St. 557; Catholic Assn. v. Priest, 46 Mich. 429; Ballou v. Gile, 50 Wis. 614; Kentucky Mut. Ins. Co. v. Miller, 13 Bush 489; Bolton v. Bolton, 73 Me. 299;*

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called on him on a visit of sympathy, but the director declined to receive it; at the same time, however, he told him to give himself no trouble about the matter, and assured him that he would pay the assessment for him immediately. The director did not tender the money for him until one day after the expiration of the ten days, when the treasurer refused to receive it. Subsequently, when Van Houten learned (which was within two days from the refusal) that the tender had been made out of time, and that the treasurer had refused to receive the money, he gave the amount to the same director, and requested him to tender it again, which he did, with like result. Van Houten afterwards applied for re-instatement, but without success. The bill alleges that he never received but one notice, while, by the by-laws, he was entitled to two, and, by custom, to a third. It claims that the offer of the money to the director was a compliance with the requisition of the by-law, and that if Van Houten's name was stricken from the roll of members, it was, under the circumstances, done unjustly. The bill is filed against William E. Pine, president, and Charles H. Ingalls, secretary and treasurer, of the company, and "twelve hundred other copart-

As a forfeiture of benefits where the member dies from intemperance, debauchery, etc., *St. Mary's Soc. v. Buford*, 70 Pa. St. 321; or he has been expelled, *Blacksmiths Soc. v. Van Dyke*, 2 Whart. 390; see *Gorman v. Russell*, 14 Cal. 531; *State v. Williams*, 75 N. C. 134; *Diligent Fire Co. v. Com.*, 75 Pa. St. 291; or where such member's claim has been forfeited for non-payment of dues, *MacDowell v. Ackley*, 93 Pa. St. 277; *Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Logan Tribe v. Schwartz*, 19 Md. 565; *Card v. Carr*, 1 C. B. (N. S.) 197; *Pritchard v. Merchants Soc.*, 3 C. B. (N. S.) 621; *Mutual Soc. v. Lowry*, 84 Pa. St. 43; see *Com. v. Penn. Ben. Soc.*, 2 Serg. & R. 141; *Acey v. Fernie*, 7 M. & W. 151; unless such forfeiture has been waived, *Protection Ins. Co. v. Foote*, 79 Ill. 361; *Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Schunck v. Gegenseitiger Fund*, 44 Wis. 369; *Erdmann v. Mut. Ins. Co.*, Id. 376; *Mound City Ins. Co. v. Twining*, 19 Kan. 349; or the claim has been voluntarily abandoned by the member's withdrawing from the association, *Danbury Band v. Bean*, 54 N. H. 524; *Gaseley v. Separatists Soc.*, 13 Ohio St. 144; *Schriber v. Rapp*, 5 Watts 361; see *Cox v. Bodfish*, 35 Me. 302; *Berlin v. March*, 82 Pa. St. 166; *Driscoll v. Lewiston Soc.*, 59 Me. 474.

As to what allegations and proofs are requisite, *Beneficial Soc. v. White*, 1 Vt. 213; *Irish Assn. v. O'Shaughnessy*, 76 Ind. 191; *Curtis v. Mutual Ben. Co.*, 48 Conn. 98; *Fairchild v. Ins. Assn.*, 51 Vt. 613.—REP.

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ners, as The Masonic Mutual Life Insurance Company." It prays a decree that they pay the \$1,000 to the complainant, with interest and costs; that all proceedings taken by the company to annul the contract between Van Houten and them may be declared void, and also all the proceedings on the refusal to re-instate; that at his death he was entitled to all the benefits of full membership, and that the complainant is entitled to receive, up to the sum of \$1,000, the assessments payable by the surviving members on the death of a member, and that if the company has not sufficient funds to pay the complainant's claim, with interest and costs, the proper officers may be ordered to raise the money by an assessment on the surviving members. There is also the prayer for general relief. The defendants, Messrs. Pine and Ingalls, demur. The demurrer assigns, for causes, want of equity and want of parties. On the argument, objection was also made to the bill for impertinence.

The Masonic Mutual Life Insurance Company is not a corporation; it is a voluntary, friendly life insurance society. Equity takes cognizance of the affairs of such associations and grants relief by treating them as partnerships, or by looking into the scheme and compelling conformity to it, or reforming it and enforcing it; or if the plan is deemed impracticable, decreeing a dissolution and distributing the funds; and speaking generally, it redresses, as far as it can, the grievances of the members of these societies who complain to it of injustice affecting their pecuniary interests therein. *Pearce v. Piper*, 17 Ves. 1; *Buckley v. Cater*, 17 Ves. 15; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Wordsworth on Joint Stock Companies* 186, 187. In the case in hand (though it is not stated in the bill to be so) the company, as appears by the copy of the by-laws put in on their part on the argument, has a very large accumulated surplus fund, amounting to over \$20,000. Apart from that admission, and looking at the statements of the bill alone, it does not appear that the company has not a fund out of which the complainant may be paid. It is, therefore, unnecessary now to consider whether the court would, if there were no other means, order payment through an assessment on the members. It is enough to say that

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it is not an absolute, certain and clear proposition that the bill would be dismissed for want of merits on the hearing. The objection on the ground of want of equity, cannot be sustained, therefore.

As to want of parties: Only two of the members (one of them is the president, and the other the secretary and treasurer) are made parties to the bill. To require the complainant to make all the other members parties, would practically be so obstructive as substantially to put an end to the suit. But the practice of this court does not require it. In a suit in equity against an unincorporated company of numerous members to enforce a right against the whole body, it is not necessary to make all the members parties, but it is enough if so many be made parties as to insure a fair and honest trial. *Story's Eq. Pl. § 107*. Here, though only two of the members are made parties, they are the persons who hold the offices of president and secretary and treasurer, and are manifestly enough to insure a fair trial of the matter in dispute.

Those parts of the bill which state the supposed circumstances of two alleged attempts to assassinate Van Houten, and suggest that his death was the result of another, are impertinent. The bill does not charge or suggest that the company, or any of its members, had any connection with those transactions, or are in anywise responsible therefor. They have no relevancy whatever to the subject of the suit. On the argument the objection of the impertinence of this matter was discussed by the counsel of both sides, and was submitted to the judgment of the court. The subject will be dealt with under the two hundred and tenth rule, and the matter struck out. The demurrer will be overruled, with costs.

Trustees v. Wilkinson.

THE TRUSTEES OF THE UNION METHODIST EPISCOPAL
CHURCH OF SOUTH CAMDEN et al.

v.

FREDERICK R. WILKINSON, executor, et al.

A bill was filed to obtain the construction of a will, and the answer attacked the will because it had not been executed according to law, and because the testatrix did not possess testamentary capacity, and because the will had been obtained by fraud. At the hearing it was adjudged that this court had no jurisdiction to try the validity of the will. The will had been admitted to probate nine years, and its genuineness recognized and sworn to by the executor, who was the devisee, and under whose will the answering defendant claims the property as devisee.—*Held*, that a feigned issue to try its validity would not be ordered upon the application of the answering defendant.

Bill for construction of will &c. On motion for feigned issue.

Mr. J. J. Crandall, for the motion.

Mr. J. E. Hays, contra.

THE CHANCELLOR.

The answering defendant, Thomas G. Folwell, moves for a feigned issue to try the validity of the codicil to the will of Mrs.

NOTE.—The conclusion of the surrogate or ordinary as to the validity of a will only applies to *personalty* bequeathed by the will, and does not estop its being questioned in courts of law afterward, *Bogardus v. Clarke*, 1 Edw. Ch. 266; *Den v. Ayres*, 1 Gr. 153; *Snedeker v. Allen*, Pen. *42; *Bray v. Neill*, 6 C. E. Gr. 343; *Allaire v. Allaire*, 8 Vr. 312; *Foster v. Joice*, 3 Wash. C. C. 500; *Harrison v. Rowan*, Id. 580; *Turner v. Hand*, 3 Wall. Jr. 88; see *Tucker v. Whitehead*, 58 Miss. 762; *Robinson v. Allen*, 11 Gratt. 785.

The probate of a will of real estate is now, by statute, conclusive evidence of its formal execution, after seven years, *P. L. of 1872* p. 35; *1873* p. 129; *Rev. p. 1250* § 38; see *Parker v. Brown*, 6 Gratt. 554.

A court of chancery has no jurisdiction to set aside a will for fraud, inca-

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Mary Ann Folwell, deceased. This suit was brought for a construction of the codicil and the enforcement of the charge thereby created. The answer attacks the codicil, on the ground that it was not executed according to law; that the testatrix had not testamentary capacity, and that the execution of the instrument was obtained by fraud. On the hearing, it was adjudged that this court has no jurisdiction to try the validity of the codicil. The testatrix was the stepmother of the answering defendant, and by her will she left the property on which the charge is to her husband, his father. By the codicil she made the charge. The will and codicil were both offered for probate by her husband, the devisee, who was the executor, and they were proved August 19th, 1873. No attempt to impeach the codicil has ever been made since then, a period of over nine years, except in this suit. The answering defendant claims the property under his father's will. His father not only offered the codicil for probate, but swore that he believed the will and codicil were the true will and codicil of the testatrix. He not only never questioned the validity of the codicil, but affirmed it by seeking and obtaining its admission to probate. He was bound by the charge and his devisee of the property is bound by it also. The motion will be denied, with costs.

capacity &c., after such will has been probated, 2 *Pom. Eq. Jur.* §§ 913, 914; *Rogers v. Rogers*, 3 *Wend.* 503; *Colton v. Ross*, 2 *Paige* 396; *Mitchell v. Holder*, 8 *Bush* 362; *Harrison v. Guion*, 4 *Lea* 531; *Chambers v. Watson* (Iowa), 13 *Rep.* 73; *Pierce v. Prescott*, 128 *Mass.* 140; *Ballou v. Hudson*, 13 *Gratt.* 672; *State v. McGlynn*, 20 *Cal.* 233; but see *Whitfield v. Hurst*, 3 *Ired. Eq.* 242, 9 *Ired.* 170; *State v. Allen*, 2 *Tenn. Ch.* 42; *Smith v. Harrison*, 2 *Heisk.* 230; *Holden's Case*, 37 *Wis.* 98; except in the case of a foreign will, *Sneed v. Ewing*, 5 *J. J. Marsh.* 460; see *Parker v. Parker*, 11 *Cush.* 519; *Allaire v. Allaire*, 8 *Vr.* 312.—REP.

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THE TRUSTEES OF THE UNION METHODIST EPISCOPAL
CHURCH OF SOUTH CAMDEN et al.

v.

FREDERICK R. WILKINSON, executor, et al.

On a bill filed by certain of the beneficiaries of a will, whose legacies were charged on land, for its construction, and for an accounting, after it had been admitted to probate by the orphans court, all the legatees whose legacies were charged on the land being made parties—*Held*,

(1) That neither the legality of the execution of the will, nor the capacity of the testatrix, nor the existence of undue influence, could be tried in this court, although issue may have been joined thereon.

(2) That all of the legatees whose legacies were charged on the lands devised ought to be parties, and hence there was no misjoinder; nor if there were misjoinder could the objection be raised for the first time at the hearing.

(3) That a legacy to two churches, of \$5,000 to each church, charged on testatrix's lands, "the interest to be strictly applied and distributed to the poor members of said churches forever, and nothing else," is a valid, charitable gift.

(4) That the language of the gift, "five thousand dollars each, to be secured as by bond and mortgage upon the brick block of the five three-story houses at the southeast corner of Fifth and Clinton streets (two thousand dollars on each house), in the city of Camden" &c., after the death of the testatrix's husband, was sufficient to charge it on the lands described.

Bill for relief. On final hearing on pleadings and proofs.

Mr. James E. Hays, for complainant.

Mr. M. B. Taylor and *Mr. J. J. Crandall*, for defendants.

THE CHANCELLOR.

The bill is filed by two incorporated Methodist Episcopal churches in Camden, to obtain a construction of a codicil to the will of Mrs. Mary Ann Folwell, which, it is claimed, imposes a charge on land in that city in favor of each of them, for the benefit of their respective poor members; and also for an ac-

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count of rents and profits of the property, in order that the complainants may be paid the interest due them under the charge. It prays for relief generally, also. The answer sets forth many different defences. Those which it is necessary to notice are the following: that the codicil was not duly executed; that the testatrix, when it was signed, was not possessed of testamentary capacity; that it was obtained by fraud upon her; and that the gift in question is invalid, and no lawful charge on the property. It was also urged on the hearing that there is a misjoinder of complainants. The gift is as follows:

"I give and bequeath to the Broadway and Fifth street M. E. Churches, in the city of Camden, state of New Jersey, five thousand dollars each, to be secured as by bond and mortgage upon the brick block of the five three-story houses, at the southeast corner of Fifth and Clinton streets (two thousand dollars on each house), in the city of Camden, with legal interest on and after the death (and not before) of my dearly-beloved husband, Robert Folwell; said interest to be strictly applied and distributed to the poor members of said churches forever, and nothing else. Interest to be collected on the first of November of each and every year after the death of my husband aforesaid."

The codicil was made in July, 1873, and it was admitted to probate by the surrogate of Camden county in August of that year. The questions raised by the answer as to the legality of the execution of the will, the capacity of the testatrix, and the existence of undue influence, cannot be tried in this suit. *Story's Eq. Jur.* §§ 184, 238, 1445; *Allen v. McPherson*, 1 H. of L. 191; *Gould v. Gould*, 3 Story 516, 537; *Quidort's Adm. v. Pergeaux*, 3 C. E. Gr. 472, 477; *Ryno's Ex. v. Ryno's Adm.*, 12 C. E. Gr. 522; *Broderick's Will*, 21 Wall. 503; *Gaines v. Chew*, 2 How. 619; *Jones v. Frost*, Jacob 466; *Jones v. Gregory*, 2 De G. J. & S. 83. It is true that in *Lynch v. Clements*, 9 C. E. Gr. 431, the defence of undue influence in obtaining a will which had been admitted to probate, was entertained and prevailed in a suit brought by the residuary legatee to recover property which passed to him by it. But the question of jurisdiction does not appear to have been raised. And, moreover, in that case the wrong-doer, the person who obtained the will by

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fraud, sought the assistance of this court to effect his evil design, and it was properly denied. *Nelson v. Oldfield*, 2 Vern. 76. Where a question is raised here by way of defence in regard to the validity of a will, this court will, in a proper case, refrain from granting relief based on the validity of the instrument until proper opportunity has been had to test the question in the appropriate tribunal. *Story's Eq. Jur.* § 1446. The answer on this head presents nothing but mere bare denials of the validity of the codicil, based on allegations of matters, all of which are cognizable in the probate courts, and on that subject the defence is in fact a mere appeal from the surrogate to this court.

It is urged, on behalf of the answering defendant, that, seeing that issue has been joined in this suit on the question of the validity of the codicil, it is, therefore, the duty of this court to litigate it here; but if this court has not jurisdiction, it is its duty to make the objection, and consent cannot give jurisdiction. *Heyer v. Burger*, Hoffm. Ch. 1; *Ryno v. Ryno*, 12 C. E. Gr. 522.

The property disposed of by the codicil was the separate estate of the testatrix. By her will she gave all her property to her husband, and he appears by the evidence to have been more active than any one else in obtaining the codicil. Indeed, he got it drawn for her, and if there was any influence he alone seems to have exerted it. The contestant is his son, her stepson, to whom, by his will, he gave a life-estate in the property. The codicil was executed in the presence of three witnesses, Mr. Fulmer, who drew it, Isaiah Woolston and Mrs. Lock, the testatrix's nurse. Mrs. Lock is dead. Mr. Woolston and Mrs. Lock made the proofs of the execution before the surrogate. They both testified then that they were present at the same time and saw the testatrix sign her name to the instrument, and heard her publish, pronounce and declare it to be a codicil to her last will and testament, and that at the doing thereof she was of sound and disposing mind and memory, so far as they knew, and as they verily believed, and that Mr. Fulmer was present at the same time and witnessed the execution thereof, and that they and

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he each signed their respective names as witnesses to it at the same time, at the request and in the presence of the testatrix, and in the presence of each other. It is true Mr. Woolston, in his testimony in this suit, says that after the codicil had been executed the testatrix's husband asked him to get her to acknowledge both the will and the codicil, and that he asked her accordingly if she "acknowledged that to be her hand and seal," and that she said she acknowledged nothing. But not only does Mr. Fulmer swear that nothing of the kind was said, but Mr. Woolston, on the 19th of August, 1873, twenty-one days after the codicil was made, testified, as before mentioned, before the surrogate that he heard her publish, pronounce and declare the instrument in question to be a codicil to her last will and testament &c. And, it may be remarked, he appears to have been careful then as to his testimony, for he was, from conscientious scruples, unwilling to take an oath and was duly solemnly affirmed. Moreover, the surrogate swears that after preparing the proof for the codicil he carefully read over to Mr. Woolston, word for word, the affirmation which the latter made, and that he made no objection to it. Besides, both Mrs. Middleton and Mr. Gardom testify that the testatrix said to the latter, who showed her the codicil the morning of the day before her death, and nine days after it was executed, that it was all right. By it she gave Mr. Gardom, who was an old friend of hers, a legacy of \$1,000. That Mr. Woolston's memory on the subject is not to be relied on, is evidenced by the fact that he does not remember that Mrs. Lock was present when the codicil was signed. It appears also, by his answer to the question whether the testatrix at any time, in his presence, acknowledged the codicil, or declared the paper to be a codicil to her last will; to which he replies, "In no other way but by signing it, as I recollect; it is a long time ago." He says he does not recollect that the codicil was read over to the testatrix in his hearing, but adds that it might have been. Mr. Fulmer swears that it was read over to her by her husband in the presence of all who were in the room, all being quiet, and she and all the rest paying attention. To the question whether the testatrix, in fact, requested him and Mr. Fulmer to sign

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their names as witnesses to the codicil, while Mr. Woolston says he thinks not, he also says that she might have done it, that he does not recollect; it was some years ago. His testimony in this suit was given in April, 1880, over six years from the time when the codicil was made. The testatrix's husband, sole legatee and devisee under her will, proved the will and codicil soon after her death, and then affirmed that they were her true last will and codicil thereto, so far as he knew, and as he verily believed, and the probate has stood unchallenged, except in this suit, for now over nine years.

There is no misjoinder of complainants. Where a bill is filed to obtain the benefit of a charge of legacies on an estate, all legatees whose legacies are so charged should be made parties. *Story's Eq. Pl. § 164*. And further, the objection, if it were good if taken by demurrer, plea or answer, is too late when made, as it is in this case, for the first time on the final hearing, unless the court, finding itself embarrassed by the misjoinder in administering relief, should see fit to entertain it. *Annin v. Annin, 9 C. E. Gr. 184*.

It is admitted that the complainants are religious corporations under the laws of this state, and that it is they who are referred to in the codicil as "the Broadway and Fifth street M. E. Churches, in the city of Camden, state of New Jersey." The gift is a valid charity. It is of the sum of \$5,000 with legal interest after a certain time (the death of the testatrix's husband), to each of the two complainants; "the interest to be strictly applied and distributed to the poor members of said churches forever, and nothing else." It is urged, however, that the gift, being confined to the poor of the churches, is not of so extensive a character, either in number of objects to be benefited or territorial limits, as is required (it is insisted) for a valid charity. This argument is based on an erroneous idea of the requisites of such a charity. In *Magill v. Brown, Bright. 347*, a gift for the poor members of the Friends Society was sustained. In *Straus v. Goldsmid, 8 Sim. 614*, one for ten worthy men to purchase meat and wine for the service of two nights of the passover, was held good; and in *Witman v. Lex, 17 S. & R. 88*, a gift of

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money "to be laid out in bread annually, for ten years, for the poor of the Lutheran congregation of which the donor was a member," was adjudged to be a valid charity. So, also, of a gift to twenty aged widows and spinsters of a parish. *Thompson v. Corby*, 27 Beav. 649; and a gift to poor relations. *Brunsdon v. Woolredge*, Ambler 507. So, too, of a gift to a masonic lodge; the court saying that a leading object of the society was supporting the poor members, their widows and orphans, and adding that the object was essentially perpetual. *King v. Parker*, 9 Cush. 71. It need not be said that one of the objects of a Christian church is to relieve the physical wants of the poor, and that the poor of the particular society are special objects of such charity to its members.

To consider the remaining objection, which is that the language of the gift is not such as to create a charge. The gift is to the two churches, of \$5,000 to each, to be secured as by bond and mortgage on the five houses, \$2,000 on each house, with interest after Mr. Folwell's death. The codicil was not drawn by a lawyer. The language used, however, is such as to convey very clearly the idea of a charge of \$2,000 on each house and lot. The design is so manifest that further remark on the subject is unnecessary. The complainants are entitled to the account they seek. *Wallington v. Taylor*, Sax. 314.

LEWIS REED

v.

THE CUMBERLAND MUTUAL FIRE INSURANCE CO.

1. Where a defendant claims by his answer the same benefit that he would have been entitled to had he demurred, and sets up a general denial of jurisdiction, he can only insist upon this defence at the hearing.

2. Where a bill calls for an answer to several distinct averments according to defendant's knowledge, information, remembrance and belief, an answer

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merely denying knowledge is defective. It ought also to include defendant's information.

3. Where a bill asks for a discovery of the contents of a lost policy of insurance, an answer referring to a copy of such policy as annexed thereto, and having such copy annexed, is sufficient.

4. Where the bill states that the complainant desired more insurance on his premises, and so notified the defendants; that the defendants consented thereto, but declined taking such additional risk themselves, and by their agent directed complainant where to obtain it, an answer that this statement is untrue is defective. It ought to have added that no part of it is true.

5. Where the bill asserts that application for payment of the loss under complainant's policy was made to defendants, and makes allegations as to defendant's replies thereto, an answer setting forth the correspondence between the parties on that subject by letter, held unobjectionable.

6. Where the bill alleges that defendants had, after complainant's loss, made an assessment on his premium-note in order to pay another loss, and thereby waived any forfeiture for breach of condition of his policy, a denial in the answer that such an assessment had been made, coupled with an averment that if so it had been made through a mistake of defendants' agent, and that the amount of the assessment had been afterwards promptly tendered to complainant, may be permitted to stand.

7. Statements in the answer in this case in regard to the by-laws of the defendants (a mutual insurance company), and their binding effect on the complainant as a member of the company—*Held* not irrelevant.

8. Where the bill avers that the premises destroyed were worth \$4,500, a declaration, in the answer, that complainant adjusted his claims against the other insurance companies which held risks thereon, on a basis that fixed the value of the insured premises at \$2,500, is not impertinent.

Bill for relief. On objections to answer on notice under two hundred and tenth rule.

Mr. J. J. Crandall for complainant.

Mr. W. E. Potter, for defendant.

THE CHANCELLOR.

The bill is filed for discovery and relief upon a policy of insurance for \$1,000, issued by the defendant to the complainant, upon a store and dwelling-house in Atlantic City. The premises insured were (as is alleged in the bill), together with the

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policy, destroyed by fire during the continuance of the term for which the insurance was effected. The bill states the ownership of the premises by the complainant; the issuing of the policy to him; that after the delivery of the policy to him he built extensions and additions to the buildings, thus greatly increasing their value, and afterwards informed the defendant that he desired and intended to procure additional insurance on the buildings as so improved, and was informed by it that it had no objections; that it would carry no more insurance on the buildings; that it readily gave its consent to his getting additional insurance, and by its agent directed him to whom to apply therefor, and that he accordingly procured additional insurance to the amount of \$3,000. It also states the assignment of the policy by the complainant to his father, with the consent of the defendant, as collateral security for a loan, which has been paid, so that the complainant is now the absolute owner of the policy; the total destruction of the premises, with the policy, by fire, and that they were, at the time of the loss, worth \$4,500; and that the complainant has received from the other insurance before mentioned \$3,000 on account of the loss; that the loss was without the complainant's procurement or fraud; that the policy contained conditions obligatory upon the insurer and insured, as well as conditions which were mutual to both, and by its destruction the complainant has lost the evidence of his contract of insurance with the defendant; that he is unadvised of its contents and has no means of finding them out, so that he is wholly unable to declare in a court of law in the terms of the policy, by appropriate pleading, he being entirely unable, for the want of knowledge, to set out and aver the performance specifically of any or all the conditions precedent in the policy; that with all convenient speed after the loss he furnished the defendant proof of his loss, and requested payment to the amount of \$1,000; that about five months after the loss, the defendant pretended that the complainant had violated the condition of the policy by obtaining the other insurance upon the premises without its consent, and stated that it had two suits pending on precisely the same conditions, the ruling in which, if made general, would be

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its guide in the settlement of all such cases, and that until such ruling was reached it would not pay any such claim; that as a part of the consideration of the insurance taken from the defendant the complainant executed to the defendant his promissory note of \$400, to be paid on assessments by the defendant as the exigencies of its business should require, as a mutual undertaking; that when the complainant demanded that the defendant should perform its obligation of insurance by paying his loss, he informed the defendant of the loss of the policy and that he could not surrender it for cancellation; that the defendant did not surrender his note, but on the contrary, while the negotiations for settlement were pending between them for the payment of the loss, and while the complainant was in expectation of such payment ultimately, the defendant assessed him on the note \$10, and demanded payment of the assessment, with which demand the complainant complied; and that the complainant has, to the best of his knowledge, information and belief, performed, in good faith, all and every of the conditions in the policy to be performed on his part; and that the defendant, by its act in keeping the contract open and executory, has in equity estopped itself from insisting that there are any unperformed conditions precedent to the complainant's right to recover.

The bill prays for an answer without oath, to the best of the knowledge, remembrance, information and belief of the defendant, and for a discovery of each and every condition contained in the policy which may require any further performance of the complainant as a condition or conditions precedent to his right to have a decree in his favor against the defendant for \$1,000; for a discovery whether the defendant bound itself by writing obligatory (the policy) to indemnify the complainant against loss by fire as set forth in the bill; and if not, what the writing was, setting forth its contents specifically; also, whether the defendant holds the note given by the complainant as before stated, and whether it has obtained the judicial decision referred to, and that the defendant may be decreed to pay the amount of the loss.

The answer admits the issuing of the policy, referring for the

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terms, amount, conditions of insurance and description of the property to the policy, and the written application for it, when they shall be produced, and states that the defendant, for convenience, annexes to the answer a true copy of both, and prays that they may be deemed and taken as part of the answer; that the defendant does not know, except from the bill, whether extensions and additions to the buildings were made, but denies that the complainant informed the defendant of his desire to procure the additional insurance, and that it consented thereto, and by its agent directed the complainant to whom to apply for such additional insurance, and that he, in obedience to such directions, procured additional insurance to the amount of \$3,000, and alleges that, on the contrary, the additional insurance, if obtained by him, was obtained without the knowledge, consent or approval of the defendant, and in violation of the second condition of its policy issued to him, that condition being one of the by-laws of the company annexed to the policy, and by its terms made a part of it; that the defendant assented to the assignment to the complainant's father, but alleges that the defendant does not know, except by the bill, whether the complainant, at the time of the commencement of this suit, had discharged the trust and liens for which the policy was assigned, and leaves the complainant to make proof thereof. It denies that at the commencement of the suit there was any amount due on the policy to the complainant or any one else; states that the defendant has been informed and believes that the buildings described in the application and policy were partly or wholly destroyed by fire, as stated in the bill, but denies that they were worth \$4,500, and avers, on information and belief, that they were not worth more than \$2,500; it admits that the fire was without the procurement or fraud of the complainant, but states that the defendant does not know, except from the bill, whether the policy was destroyed in the fire or not, and leaves the complainant to make proof as to that fact. It admits that the policy contained conditions obligatory upon both insurer and insured, and states that they are exactly set forth in the copy of the application and of the policy annexed to the answer, but denies that the complainant is

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wholly unadvised of the contents of the policy, or has no means of finding them out, and denies also that he is unable to declare in a court of law, for want of knowledge on that head, and insists that, on the contrary, a court of law is the appropriate and only tribunal in which to make his claim for indemnity. It admits that after the fire the complainant made proof of the loss, and alleges that subsequently its secretary wrote a letter to the complainant (which is set forth), refusing to pay the loss, on the ground of the violation of the condition of the policy in obtaining the additional insurance; it states that the complainant never denied the statement made in that letter, so far as the defendant knows, until he did so by his bill, and that the defendant received a communication from the complainant's father on the subject of the claim (which letter is set forth in the answer), admitting such other insurance, but claiming that the money recovered thereunder did not amount to his debt, and that therefore the additional policies were of no value to the defendant.

The answer sets forth the defendant's reply to that letter at length, in which is contained the statement referred to in the bill in reference to the pendency of suits involving the same question, and it admits that a part of the consideration of the insurance by it was a note. It denies that when the complainant demanded payment of his claim he informed the defendant of the loss of his policy, and that it could not be surrendered up to be canceled, but admits that the defendant did not surrender to him the note. It states that it is not its custom to surrender the premium note of any of its members, and denies that it ever assessed the complainant on the note and demanded payment, but admits that a clerk in its office forwarded to its agent in Atlantic county a list of persons assessed in 1880, and by mistake, and without the knowledge and direction of any of its officers, included the complainant's name in the list as assessed to the amount of \$10, and that the amount was paid to the agent by the complainant, as he alleges; but the defendant insists that he paid it for the express purpose of laying the foundation of a claim against the defendant in respect to the policy of insurance, which, it alleges, he knew was then forfeited and

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void. And the answer says that on the discovery that the \$10 had been paid, the defendant tendered the money back to the complainant, but he declined to receive it. It denies that the complainant performed all the conditions of the policy, and avers that in obtaining other insurance without its consent he violated one of the conditions of the policy, and alleges that the defendant had no knowledge of those insurances, or either of them, until it was informed thereof by complainant's proof of loss; that the defendant is a mutual company, and that the complainant, in taking the insurance, became a member of it, and was chargeable with a knowledge of its charter, by-laws, resolutions and conditions of insurance; and it further states that because the premises were not worth, at the time of the loss, more than \$2,500, the complainant adjusted his loss with the other two companies at sixty per centum of the face of their policies.

To consider the objections. As to the demurrer in the answer for want of jurisdiction: The complainant objects to the demurrer, on the ground that it cannot be maintained, inasmuch as by reason of the loss of the instrument under which he claims indemnity, equity is the appropriate tribunal for the redress of his grievance. It is to be remembered that the question on this motion is not whether the demurrer can be sustained, but whether it is competent for the defendant to insert such demurrer in his answer. The defendant may claim by the answer the same benefit that he would have been entitled to if he had demurred to the bill, or pleaded the matter alleged in his answer in bar; but in such case it is only at the hearing of the cause that any such benefit can be insisted upon. He will, however, then, in general, be entitled to all the same advantage of this mode of defence that he would have had if he had adopted the more concise mode of demurring or pleading. *1 Dan. Ch. Prac.* 715; *Wray v. Hutchinson*, 2 *M. & K.* 235, 238, 242; *Milligan v. Mitchell*, 1 *M. & C.* 433, 447; *Clark v. Flint*, 22 *Pick.* 231; *Ludlow v. Simond*, 2 *Cal. Cas. in Err.* 1, 40; *Manning v. Merritt*, *Clarke Ch.* 97. The demurrer in question, therefore, should be allowed to stand.

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The bill alleges that after the insurance had been effected the complainant built extensions and additions to the insured buildings, greatly increasing their value. The defendant answers that as to them it has no knowledge except from the bill. Such an answer is not sufficient. The bill calls upon the defendant to answer according to its knowledge, information, remembrance and belief. An answer merely denying knowledge and leaving the complainant to make proof, is not a compliance with the requisites of good pleading in this respect. The defendant should answer as to its information as well as knowledge.

The answer admits the issuing of a policy, and states that, for convenience, the defendant annexes to the answer true copies of the application and policy, which it prays may be deemed and taken to be a part of the answer. It is insisted that this is not proper pleading. In fact, on an inspection of the answer, it appears that the papers referred to are not annexed; but the policy should be so while the application should not. There is no call in the bill for the latter. However, no objection is made on that ground. The bill asks for a particular discovery as to the policy and its contents; it certainly can be no ground of objection that the defendant makes discovery by annexing a copy of the document to its answer, making it a part thereof by a reference thereto.

The next objection is that the defendant denies literally and as a whole the important statement contained in the bill, that the complainant desired to procure additional insurance on the buildings as improved, and that the defendant assented thereto, and, by its agent, directed him to whom to apply for such additional insurance, and that he, in obedience to the agent's direction, obtained such insurance. It is a requisite of pleading, that if the fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but must answer the point and substance positively and certainly. *Gres. Eq. Ev. 24*. It will have been seen that in this case the statement of the bill is that the complainant desired more insurance, and notified the defendant of it; that the latter consented to the obtaining of more insurance, but declined

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to take it itself, and, by its agent, directed the complainant where to obtain such additional insurance. The answer responds that this statement is untrue, but it does not say that no part of it is true. It proceeds to say, indeed, that the additional insurance was obtained without its knowledge, consent or approval, but wherever there are particular, precise charges they must be answered particularly and precisely, and not in a general manner, although the general answer may amount to a full denial of the charge. *Story's Eq. Pl. § 851.*

The defendant has answered to the statement of the bill in respect to the satisfaction of the debt for which the assignment was made, that it has no knowledge on the subject except from the bill. The complainant objects that this answer is not full. This objection has been before considered in reference to another part of the answer. The defendant should answer on information as well as knowledge.

In answering the statement touching the fact of the destruction of the insured premises by fire, the defendant denies that the premises were worth \$4,500 (as alleged in the bill) at the time of the fire, and says they were not worth more than \$2,500; this is a direct answer to the bill and unobjectionable.

The answer to the allegation that the policy was destroyed, is merely upon knowledge; it should be upon information also.

In answering the complainant's statement of his reasons for coming into equity for relief, the defendant responds with a general denial of the jurisdiction. The answer, in this respect, for the reasons heretofore given, is not liable to exception.

In the statement of the bill in regard to the application of the complainant for payment of his loss, allegations are made as to the replies which were made to it by the defendant. In the answer, on this point, the defendant states the correspondence which took place by letter. One of the letters was written by its secretary to the complainant; another by the complainant's father's attorney to the company, and the third is a reply of the company to that letter. These documents are not prolix, and there seems to be no reasonable objection to this method of ad-

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mitting the statements in question ; that is, by setting forth the correspondence in which they are contained.

The bill states that after the loss and demand for payment, and while the claim of the defendant was held in abeyance by the defendant, the latter assessed the complainant on his premium note, and that he paid the assessment accordingly. This, the complainant insists, is a waiver of objection to the alleged breach of condition in obtaining the additional insurance. The defendant, by the answer, alleges that the assessment in question was made by mistake ; and that when the mistake was discovered the money paid was tendered back to the complainant, who refused to take it. The complainant's counsel urges that the denial of the making of the assessment, and the admission that it was made by mistake, are inconsistent ; that the defendant, by the answer, admits the facts stated by the complainant as the evidence of waiver, and seeks to avoid the effect of them by averring that the assessment was made under such circumstances (through mistake) as not to estop the company. The question of waiver, under similar circumstances, was considered in *Combs v. Shrewsbury Ins. Co.*, 7 Stew. Eq. 403. But the case is not now before me on final hearing on bill and answer. The question to be decided now is, whether, if the allegation of mistake be true, it may be material to the defence. I surely cannot undertake to say that it will not, and more I ought not to say on this motion. The pleadings, in the respect under consideration, should be permitted to stand.

To the averment of the bill that the complainant performed all the conditions of the policy, and that the defendant by its acts (referring to the assessment) waived all breaches thereof, the defendant answers with a denial, alleging the breach of the condition in respect to other insurance, and insisting that the policy, by reason thereof, was rendered void. The statement of the bill is merely a general statement of the complainant's claim as to the liability of the defendant, and the answer, on the other hand, is simply a general statement of the position of the defendant in denial thereof.

The statements in the answer, in regard to the by-laws of the

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company, and their binding effect upon the complainant as a member of the company, are not irrelevant, and should be permitted to stand.

The allegation that the complainant adjusted his claim for the loss with the other insurance companies, on the basis of the valuation of the insured premises, at \$2,500, is not impertinent in view of the complainant's averment that the premises were worth \$4,500. It is, in fact, a statement that the complainant in that way admitted that the premises were, in fact, not worth more than \$2,500.

The result of the foregoing considerations is, that the objections made to the form of the answer, because certain of the denials are upon knowledge alone, are sustained, as is also the objection made as to the mode of answering the statements of the bill as to the consent of the company to the additional insurance, and the circumstances under which the bill alleges it was given. The rest are overruled. The complainant is entitled to the costs of the motion.

WILLIAM R. FRAZIER, admr. &c.,

v.

GEORGE B. SWAIN et al.

A master's report should show in what way he arrived at his conclusion, so as to enable the court to ascertain from the report itself whether his method was right or not, especially in a case where more than a simple computation of the amount due is necessary.

Bill to foreclose. On exceptions to master's report.

Mr. C. Lentz, for exceptant.

Mr. L. D. Taylor, for complainant.

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THE CHANCELLOR.

The master to whom it was referred to ascertain the amount due on the complainant's mortgage, has reported that there was due thereon the sum of \$3,582.16 at the date of the report, June 30th, 1882. The mortgage was given April 10th, 1850, by Abraham and Isaac Wildrick to Susan Wildrick, now deceased (whose administrator the complainant is), to secure the payment of an annuity of \$120 for her life (the annuity beginning on April 1st, 1850), together with some fire-wood to be delivered annually. The annuity was given for her dower in the mortgaged premises. It does not appear from the proof that it was at any time paid in full, but according to the evidence, Mrs. Wildrick, who was the widowed stepmother of the mortgagors, annually received in cash so much of the annuity as she required, leaving the rest standing on an agreement between her and the mortgagors that they would pay her interest for it. Isaac Wildrick testifies that the practice was each year to pay part of the annuity and give the mortgagor's note for the balance, and the interest which had accrued on any unpaid balance or balances, so compounding the interest on the unpaid balances. In 1862 they gave her a note of \$1,575, which Isaac Wildrick says (and he is the only witness on the subject) was for such balances and compound interest thereon, and also for a legacy of \$200 due her under their father's will, and compound interest thereon from April, 1850. Another note of \$336 was given April 2d, 1867; another of \$150, April 2d, 1868; another of \$198.37, April 1st, 1870, and another of \$200, April 1st, 1871. Mrs. Wildrick died in August, 1875. The master merely reports the amount due. By the schedule annexed to the report it appears that he calculated the amount due for principal and interest on account of the annuity up to April 1st, 1875, and added interest thereon to the date of the report. Neither the report nor the schedule states or shows in any way beyond this by what process he reached the result. A master's report should show in what way the master arrived at his conclusion, so far as to enable the court to determine from the report itself whether his method was

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right or not. This case is not one where only a simple computation of the amount due is required—where the factors are obvious and unquestionable. It does not appear directly what amount was paid each year, nor any year except one, on account of the annuity. From the result reached by the master it seems quite probable that he assumed, for the purposes of the calculation, that a certain sum, the same each year, was paid on that account. Isaac Wildrick testifies that the note for \$1,575, given in 1862, was given for the amount then due to the mortgagee for the legacy of \$200, and compound interest thereon from April, 1850, and the arrears of annuity from and including April 1st, 1852, to that date, with compound interest thereon; but he is unable to say what money was paid previously to the giving of the note on account of the annuity, or what amount of interest entered into the note. It is, therefore, impossible to say what deduction should be made from the amount of the note for compound interest on the annuity, or, indeed, whether there was any compound interest at all on the annuity in it. A careful consideration of the matter and a calculation I have made, lead me to conclude that the \$200 (the amount of the legacy), and compound interest thereon for twelve years, from 1850 to 1862, should be deducted from the amount of the note, and that the balance of it should be taken to be the amount due for arrears of annuity at the date of the note, April 1st, 1862. What was paid at any time except in 1867 or 1868, when, as appears by a memorandum of a settlement then made, \$68.32 were paid, does not appear.

Isaac Wildrick, indeed, testifies that he thinks he never paid in money, in any year, less than \$75, but when he said this he spoke from unaided memory; for, on the memorandum before referred to being shown to him, he at once admitted that less was paid in that year. He also says he thinks that sometimes he paid more than the annuity, but he does not speak positively; and in his testimony on the issue in the cause he said, speaking of the course of dealing, that Mrs. Wildrick “wanted the notes and the money in full settlement; that that was the understanding,” and that “at one time she chose the note in preference to

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the money." By the last statement, then, it would seem that on one occasion, at least, she received no money at all. But, however that may be, the evidence as to the amount paid is not such as to enable me to say what sum was, in fact, paid on account of the annuity in any year, except as before stated. It is impossible to ascertain the amount with exactness, and it therefore becomes necessary to adopt some method of arriving at it with reasonable certainty. Under the circumstances it will not be unjust to assume that the payments made since 1862 were \$75 a year. The amount due will be ascertained as follows: From the amount of the \$1,575 note, the \$200 and compound interest thereon for twelve years will be deducted. On the balance interest will be computed to the present time, and assuming that \$75 were paid each year after 1862 to 1872, interest will be computed on each year's balance, \$45, from the time when the payment became due to the present time. The evidence as to the payments since 1872, is not such as to enable me to give specific directions as to them. It is quite probable none are necessary. The report will be referred back to the master, unless the counsel of the parties agree upon the calculation on the above basis. No costs of the exceptions will be allowed to either side.

ZENAS C. CRANE

v.

FRANKLIN E. J. FELTZ et al.

In taxing a sheriff's fees on a sale of mortgaged premises, under the act of 1879 (*P. L. of 1879 p. 177*), the taxed costs of the cause, excluding the sheriff's execution fees, must be included in computing the amount on which the sheriff's fees are calculated.

Taxation of costs in suit for foreclosure of mortgage, *ex parte*.

Mr. T. C. Provost, for complainant.

Crane v. Feltz.

THE CHANCELLOR.

This is an application for the taxation of sheriff's fees on the sale of mortgaged premises under proceedings for foreclosure. The amount reported to be due to the complainant on his mortgage was \$240.92, and the question is as to the construction of the act of March 13th, 1879 (*P. L. of 1879 p. 177*), so far as sheriff's execution fees are concerned. The act is as follows:

"In all foreclosures of mortgages and the sale of mortgaged premises, where the amount due does not exceed \$300, the fees of the solicitor, clerk, chancellor, master and examiner, sheriff, or any other official, are hereby reduced one-half of the amount now fixed by law."

The amount due for principal, interest and costs at the time of the sale determines the question whether the reduction is to be made in the sheriff's execution fees or not. Those items all enter into the computation of the amount then due. The sheriff's execution fees themselves, it is needless to say, do not. The test is not the amount decreed to be due for principal and interest on the mortgage. The taxed costs are as much part of the amount due at the time of the sale as the principal and interest of the mortgage. By the act of March 10th, 1879 (*P. L. of 1879 p. 102*), the percentage of sheriffs, on sales under execution, where the sum raised was \$1,000 or less, was fixed at one per centum, and that was the rate fixed in such case when the law under consideration was passed. The act of March 10th was indeed subsequently repealed. *P. L. of 1882 p. 33*. But the act of March 17th was not and has never been altered. It reduces the fees, where the amount due does not exceed \$300, one-half of the amount then fixed by law; that is, from the amount now fixed by law one-half of the amount then fixed by law is to be taken, in order to ascertain the legal execution fees of the sheriff.

Halsey v. Ball.

EDMUND D. HALSEY, trustee &c.,

v.

ANNIE M. BALL et al.

1. In the absence of proof to the contrary, the presumption is that a deed for lands was delivered on the day when the grantee took possession of the premises.

2. Averments in the stating part of a bill, evidently intended as statements of facts, must be answered by the defendant if he intends to deny them, although the complainant "charges" the facts, instead of "shows" or "alleges" them.

Bill to foreclose. On exception to master's report.

Mr. J. E. Howell, for the exception.

Mr. E. D. Halsey, contra.

THE CHANCELLOR.

The complainant's mortgage was given January 1st, 1874, by Annie M. Ball and her husband to Edward G. Delaney, to secure the payment of part of the purchase-money of land then conveyed by Delaney to Mrs. Ball by deed of that date. Her deed for the property was not recorded until after February 20th, 1874, when Edward Keogh recovered a judgment against Delaney in the supreme court. She, however, went into possession of the property as soon as it was conveyed to her. Satisfaction of the judgment was entered of record October 2d, 1874. That entry, however, was vacated, but it was not until February 28th, 1878, over three years afterwards. On the 26th of August, 1876 (the judgment then stood canceled), Delaney assigned the mortgage for value to Thomas E. Allen, who was executor of Jacob Tompkins, deceased, and paid for the mortgage with the money of the estate. Allen died in June, 1880, and the complainant succeeded him in the trust. The bill states that the

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judgment was recovered subsequently to the delivery to Mrs. Ball of the possession of the property, and that she continued to be, and was, in possession when the judgment was entered; that when Allen took the assignment the judgment was canceled of record, and he had no notice of its being a subsisting lien on the property, and took the mortgage in good faith and in the belief that it had been legally satisfied; and it also avers that if the judgment is a lien at all on the property, it is subsequent to the mortgage. David W. Bonnel, the assignee of the judgment, is a party to the suit, but did not answer, and the bill was taken as confessed against him. He contested before the master, however, the complainant's right to priority. The master reported in favor of the complainant, and Bonnel excepts to the report in this respect.

While it appears, from the testimony taken before the master, that Mrs. Ball took possession as soon as the property was conveyed to her, it does not appear when the deed was delivered. In the absence of proof to the contrary, the presumption is that it was delivered at its date. The above-stated averments of the bill are in its stating part, and are evidently intended as statements of facts, and not as what is technically known as a charge, although the pleader has used the word "charges" instead of "shows," or other word signifying allegation or averment. It was incumbent on Bonnel to answer them if he meant to deny them, or take issue on them, and not admit that they are true. They therefore are to be taken as admitted; and, if so, Keogh, when he recovered his judgment, had notice of the previous conveyance to Mrs. Ball, for her possession was such notice. And this takes away from Bonnel all claim to priority over the complainant's mortgage. The exception will be overruled, with costs.

Webb v. Jones.

CHARLES R. WEBB et al.

v.

GEORGE JONES et al.

1. The marriage of a woman does not revoke her will executed before such marriage.

2. A widow made her will disposing of her property. She afterwards entered into a marriage settlement, whereby she assigned a very large part of her property (it was all personal) and the income thereof, and of all her other property, to trustees in trust for herself for life, and after her death to distribute the property assigned to certain persons whom she named, and who, with a few exceptions, were the same persons who were named as legatees in the will, reserving to herself, with the express assent of her future husband, a testamentary power of disposition over her estate, which was, by the settlement, put into the hands of her trustees. She was married and died without any further execution of the power.—*Held*, that her will was not revoked by her marriage, and was a good execution of the power.

3. Also, that the property assigned to the trustees must be distributed according to the terms of and under the settlement, and not under the will; but that under the circumstances the gifts to the legatees were adeemed to the extent of the provision made for them in the settlement.

4. That the husband waived or relinquished any rights of survivorship in the wife's remaining personalty by allowing her will to be probated.

Bill for relief. On final hearing on pleadings and proofs

Mr. C. A. Bergen, for complainants.

Mr. H. M. Cooper, for answering defendants.

THE CHANCELLOR.

Emily D. Bailey, being then a widow, made her will in 1874, and a codicil thereto in 1875. She married Mr. Jones in October, 1877. In an ante-nuptial settlement made between them in September of that year, she assigned a very large part of her property (it is all personal) to the complainants, Charles R.

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Webb and John Burkitt Webb, with all the profits and income thereof, and of all other moneys of hers which then or thereafter should come to them or the survivor of them, in trust for herself for life, and after her death to be distributed to certain persons named in the instrument of settlement, in the manner therein directed, with a provision that the trustees should stand seized and possessed thereof to the use of such person or persons, and in such shares and proportions, as she, by her last will and testament, or a writing in the nature thereof, signed in the presence of and attested by two or more witnesses, might give them to or appoint to take them; and Mr. Jones covenanted and agreed with the trustees that he would permit her to give, grant and dispose of her separate estate as she should think fit, in her lifetime, and to make such will or appointment and thereby to dispose of her separate estate, and would suffer the will to be proved and executed. The legatees in the will are, with a few exceptions, the same as the beneficiaries named in the trust in the deed of settlement as distributees of her estate, if she should die intestate. She made no will after that of 1874, and she never canceled that will or the codicil. After her death, the will and codicil were duly proved in Camden county. The bill

NOTE.—At common law or by statute in some states, the will of a *feme sole* is revoked by her marriage, 1 *Jarm. on Wills* 79; 1 *Wms. on Exrs.* 76; *Schouler on Husb. and Wife* § 457; *Lant's Appeal* (Pa.), 10 *Rep.* 645; *Fransen's Will*, 26 *Pa. St.* 202; *Lathrop v. Dunlop*, 4 *Hun* 213, 63 *N. Y.* 610; *Brown v. Clark*, 77 *N. Y.* 369; *Loomis v. Loomis*, 51 *Barb.* 257; *Vail v. Lindsay*, 67 *Ind.* 528; unless the husband's assent be obtained, *Hoyt v. Jaques* (Mass.), 14 *Law Rev.* 808; *Kurtz v. Saylor*, 20 *Pa. St.* 205; *Cooper's Case*, *L. R.* (6 *Prob. Div.*) 34; *Cavanaugh v. Anichbacher*, 36 *Ga.* 500; *Newlin v. Freeman*, 1 *Ired.* 514; *Burton v. Holly*, 18 *Ala.* 408; *Lee v. Bennett*, 31 *Miss.* 119; *Fane's Case*, 16 *Sim.* 406; *Smellie v. Smellie*, 2 *Desaus.* 66; see *Urquhart v. Oliver*, 56 *Ga.* 344; *Burroughs v. Nutting*, 105 *Mass.* 228; *Allen v. Little*, 5 *Ohio* 65; *Churchill v. Corker*, 25 *Ga.* 479; and the death of the husband would revoke his assent, *Noble v. Willock*, *L. R.* (8 *Ch. App.*) 778, 7 *H. L. C.* 580; *Smith's Case*, 1 *Sw. & Trist.* 137; *Reay's Case*, 4 *Id.* 215; *Price v. Parker*, 16 *Sim.* 198; see *Wood v. Bullock*, 3 *Hawks.* 298; *Walker v. Hall*, 34 *Pa. St.* 483.

But in some instances such revocation has been deemed only a presumption liable to be rebutted, *Miller v. Phillips*, 9 *R. I.* 141; *Yerby v. Yerby*, 3 *Call* 334; see *Arthur's Appeal* (Pa.), 14 *Cent. L. J.* 337.

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is filed to obtain the direction of the court as to how the property in the hands of the trustees is to be administered; whether under the will or the settlement; and as to other property (all personal) of Mrs. Jones which did not come to the hands of the trustees, in her lifetime, whether it is to be disposed of according to the will (and if so, how), or goes to Mr. Jones as surviving husband; that is, whether the marriage of the testatrix was a revocation of her will. It will have been seen that by the marriage settlement Mr. Jones covenanted that his wife might dispose of her separate estate by will or appointment. It is quite clear that he has no equitable claim to any part of her separate estate. Nor could he make any. He has permitted her will to be admitted to probate. Indeed, he makes no claim. He has not answered in the cause.

But it is insisted that the marriage revoked the will, and that, therefore, the law casts the title to the property which did not come to the hands of the trustees, upon him. I am of opinion that the marriage did not revoke the will. The reason why at the common law the marriage of a woman was a revocation of her will, was that she could not, as a married woman, make a will, and therefore wills being, in their nature, ambulatory until

As to the formalities necessary to revive the will of a woman which has been revoked by her marriage, *Brown v. Clark*, 16 Hun 559, 77 N. Y. 369; *Bizzey v. Flight*, L. R. (3 Ch. Div.) 269; *Thorndike v. Reynolds*, 22 Gratt. 21; *Graham's Case*, L. R. (2 P. & D.) 385; *Heathcote's Case*, L. R. (6 Prob. Div.) 30; see *Wood v. Bullock*, 3 Hawks 298; *Ash v. Ash*, 9 Ohio St. 383; *Grimke v. Grimke*, 1 Desauss. 366.

The English statute (1 Vict. c. 26 § 13) makes a marriage subsequent to the execution of a will, either by a man or a woman, a revocation, except in the execution of a testamentary power, *Richard's Case*, L. R. (1 P. & D.) 156; *Fenwick's Case*, Id. 319; *McVicar's Case*, Id. 671; *Otway v. Sadlier*, 4 Irish Jur. (N. S.) 97; *Worthington's Case*, 25 L. T. Rep. (N. S.) 853; *Fitzroy's Case*, 1 Sw. & Trist. 133; and some of the United States have similar statutes, *Phaup v. Wooldridge*, 14 Gratt. 332; *Brown v. Clark*, 77 N. Y. 369; *Code of Ala.* 1876 § 2283; *Gen. Stat. of Ky.* 1873 p. 834 § 9; *Rev. Stat. of Mo.* 1879 vol. I. p. 680 § 3965.

A power of testamentary disposition, reserved in a marriage settlement, may be exercised by a *feme covert* after her marriage, *Michael v. Baker*, 12 Md. 158; *Buchanan v. Turner*, 26 Md. 1; *Newlin v. Freeman*, 4 Ired. Eq. 312; *Mullins v. Lyles*, 1 Swan 337; *Mitchell v. Holder*, 8 Bush 362; *Harris v. Harbeson*, 9

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the testator's death, the law deprived her will made before marriage of all validity. And though a wife might, in the absence of an enabling provision in the marriage settlement, make a valid will of her separate estate, without her husband's consent, and therefore, in such case, the reason for the rule ceased, yet the rule was held to be applicable under such circumstances also. Where, however, a woman, after the execution of a marriage settlement, giving her a power to dispose of her property by will, made a will before marriage in execution of the power, it was held not to have been revoked by the marriage. *Logan v. Bell*, 1 C. B. 872. But, by our law, a wife loses no power to make a will by her marriage, except so far as the interest which the law gives her husband in her real property is concerned. That her will cannot affect. But as to her personal property and her real property, too (subject to her husband's rights therein), she has as full power to make a will as she had when she was unmarried. In other words, her right to make a will continues as before, notwithstanding her marriage. The reason, therefore (her disability), for holding marriage to be a revocation no longer exists, and therefore the rule itself should no longer exist. In this case the will has been admitted to probate,

Bush 397; *Albrecht v. Pell*, 11 Hun 127; where the husband survives, *Schley v. McCeney*, 36 Md. 266; *Gackenbach v. Brouse*, 4 Watts & Serg. 546; *Trim-mell v. Fell*, 16 Beau. 537; whether the property so devised is liable, after her death, for her debts, *Shattock v. Shattock*, L. R. (2 Eq.) 182; *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Hobday v. Peters*, 28 Beau. 354; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Smith v. Cherill*, L. R. (4 Eq.) 389; *Rogers v. Hinton*, Phil. (N. C.) Eq. 101, 63 N. C. 78; *Stewart v. Ross*, 50 Miss. 776; *Triplett v. Romine*, 33 Gratt. 651; see *McTier v. Hunter*, Riley 159; *Rodgers v. Brazeale*, 34 Ala. 512.

As to the formalities requisite in the execution of such a power, *Porcher v. Daniel*, 13 Rich. 349; *West v. West*, 3 Rand. 373; *Whitfield v. Hurst*, 3 Ired. Eq. 242; *Heath v. Withington*, 6 Cush. 497; *Elu v. Edwards*, 16 Gray 91; *Heyer v. Burger*, Hoffm. Ch. 1; *Thorndike v. Reynolds*, 22 Gratt. 21; *Foos v. Scarf*, 55 Md. 301; *Funk v. Eggleston*, 92 Ill. 515; *Breit v. Yeaton*, 101 Ill. 242; *Blake v. Hawkins*, 98 U. S. 315; see *Bilderback v. Boyce*, 14 S. C. 528; *Dunn's Appeal*, 85 Pa. St. 94; *Noble v. Willock*, L. R. (3 Ch. App.) 778; *Hollister v. Shaw*, 46 Conn. 248; and the power of courts of equity over the matter, *Lawrence v. Bartlett*, 2 Allen 36; *Lant's Appeal* (Pa.), 10 Rep. 645; *Hughes v. Wells*, 13 E. L. & Eq. 389; *Shaw v. Dawsey*, 1 McMull. 247.—REP

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and therefore the executor has a right to all the testatrix's personal property, for the letters testamentary are general. In *Ryno v. Ryno*, 12 C. E. Gr. 522, where a married woman's will had been admitted to probate, and letters of administration were afterwards issued to her husband, it was held that the fund must be paid over to the executor to be administered according to law, because of the fact that the will had been admitted to probate. In *Douglass v. Cooper*, 3 M. & K. 378, where a woman having a power of testamentary appointment by her marriage settlement, made a will after marriage, and her husband dying, she married again, it was urged that her marriage after executing the will was a revocation of the will. The will had been admitted to probate in the ecclesiastical court. Sir John Leach, M. R., though of opinion that by the subsequent marriage the will was revoked, yet held it valid (it having been duly executed), because it had been admitted to probate. Having been admitted to probate, the will cannot be declared void here on the ground that the marriage revoked it; and, it may be added, it appears to have been executed with the formalities required by the marriage settlement. It must be accepted as the true will of Mrs. Jones, and her property must be administered under it.

The remaining question is as to what is subject to it. The property assigned to the trustees is not. That property will be distributed according to the directions of the marriage settlement, as in case of Mrs. Jones's intestacy. The provisions in the deed of settlement in favor of beneficiaries, to take effect at Mrs. Jones's death, were indeed liable by the terms of the instrument to be defeated by her will, but the testatrix evidently intended that if defeated by will it should be not by one made previously to the settlement, but one made subsequently. She conveyed the property mentioned in the settlement to the trustees, to be distributed by them, after her death, to the persons therein named. She evidently intended that the provision made in the settlement for the distribution of her estate after her death should supersede the provisions of the then existing will, and she may have been advised that her marriage would be a revocation of the will.

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As to the rest of the property, it will not go to her husband; if for no other reason, because he has relinquished whatever rights he may have had thereto by permitting the will to go to probate. It must be administered by the executors according to the will, but the gifts to the legatees will be held to be adeemed to the extent of the provision made for them in the settlement.

THOMAS WRIGLEY

v.

RICHARD O. JOLLEY.

The defendant's solicitor, in a foreclosure suit, obtained an order extending the time for answering, and filed his answer (setting up usury) within the time limited, but did not serve the order on complainant's solicitor, who entered a decree *pro confesso* after the original time for answering had expired. All the subsequent proceedings in the cause were had without his knowledge of the existence of such order or answer.—*Held*, that the final decree was regular, and that the sheriff's sale under it would not be set aside.

Bill to foreclose. On motion to set aside the sheriff's sale and open decree.

Mr. R. O. Babbitt, for the motion.

Mr. J. A. McCreery, *contra*.

THE CHANCELLOR.

This is an application to set aside a sheriff's sale and open the decree, to give the defendant the benefit of his answer. The answer was not filed within the time limited by the order of publication. That time expired June 12th. On that day the defendant's solicitor obtained, *ex parte* and without notice, an order for five days' further time. This order was never served on the complainant's solicitor. The answer was filed on the 16th of June. On the 24th of that month the complainant's solicitor, who was not aware that any answer had been filed, took a decree

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pro confesso, and on the 29th a final decree. By the answer the defendant, who is the mortgagor, sets up the defence of usury—the taking of a premium of \$45 on the loan of \$1,500. It was the duty of the defendant's solicitor, on taking the order for further time to answer, to serve a copy of it, without delay, on the complainant's solicitor. As before stated, he did not serve it at all, and the complainant's solicitor never had any notice of it. The decree *pro confesso* was regular. *Emery v. Downing, 2 Beas. 59*. The defendant's solicitor seems to have given the cause no attention whatever, after the filing of the answer. He was not aware of the subsequent proceedings until the 15th of October, when he was informed that the sale had taken place, and the notice of this motion was not given until a month after that time. The purchaser of the property swears he has expended on it, for necessary repairs and taxes, over \$100, since he bought it at the sheriff's sale. Under the circumstances, it would not be a proper exercise of discretion to set aside the sale and open the decree. The motion will be denied.

BERNARD LOEBENTHAL et al., executors &c.,

v.

BRIDGET RALEIGH et al.

1. A power to mortgage is sometimes implied in a power to sell.
2. Where power of sale is given to raise a particular charge only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising the money should be preferred to the latter.
3. A will contained this clause, "If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power to do so, either at public or private sale." The estate included a very large tract of land, which could only be sold to advantage as a whole, and whose value would be greatly depreciated by selling any part or parts of it, and by reason of its character and value a purchaser could only be obtained exceptionally and by effort. On an application by the executors

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(in which the beneficiaries under the will joined)—*Held*, that authority to mortgage it to raise sufficient money to pay the debts after applying the personal estate, should be given.

Bill for construction of will.

Mr. P. L. Voorhees, for complainants.

Mr. H. M. Snyder, Jr., for defendants.

THE CHANCELLOR.

Maurice Raleigh, deceased, late of Philadelphia, by his will made the following provision: "If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power so to do, at either public or private sale."

The bill is filed by the executors against the widow and children, the beneficiaries under the will, for authority to mortgage some of the testator's land to raise money wherewith to pay his debts. It states that there have been presented to the executors claims to the amount of about \$145,000 against the estate for debts due from the testator, and that after winding up the business which the testator authorized them to carry on, and settling all affairs in relation thereto, the executors will not have in their possession or under their control sufficient personal property of the testator to pay his debts by about \$75,000; that it has been

NOTE.—Whether a power to sell authorizes an executor to mortgage, *Ferry v. Laible*, 4 *Stew. Eq.* 566, note; also, *Russell v. Plaice*, 18 *Beav.* 21; *Deery v. Hamilton*, 41 *Iowa* 16; *Colesbury v. Dart*, 61 *Ga.* 620; *Watson v. James*, 15 *La. Ann.* 386; see *Patapsco Co. v. Morrison*, 2 *Woods* 395; *Bloomer v. Waldron*, 3 *Hill (N. Y.)* 361; *Adams v. Rome*, 59 *Ga.* 769; *Stokes v. Payne*, 58 *Miss.* 614; *Hoyt v. Jaques*, 129 *Mass.* 286; *Starr v. Moulton*, 97 *Ill.* 525.

That a court may authorize an executor to mortgage lands to pay testator's debts, *Holme v. Williams*, 8 *Sim.* 557; *Selby v. Cooling*, 23 *Beav.* 418; *Fraser v. Fishburn*, 4 *Rich. (N. S.)* 314; see *Williamson v. Field*, 2 *Sandf. Ch.* 533; or a guardian, *Biles's Estate*, 8 *Phila.* 587.

Statutory power to sell lands to pay debts was held not to authorize an order to mortgage, *Melledge v. Bryan*, 49 *Ga.* 397; *Patapsco Co. v. Morrison*, 2 *Woods* 395; or to encumber the estate by an easement, *Brown v. Van Duzee*, 44 *Vt.* 529; see *Rosenkrans v. Snover*, 4 *C. E. Gr.* 420.—REP.

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thought by them to be very advantageous to the estate to obtain a loan of \$75,000 on the land in this state, which is a very large and valuable tract of about thirty thousand acres in the counties of Camden, Burlington and Atlantic, and composed of several contiguous tracts (practically all together constituting but one tract), and is known as the Atsion and Waterford tracts, to pay off the debts and settle the estate; that that property is so situated that if small tracts were sold off it, it would greatly depreciate its value, and that as the executors are advised by those who are acquainted with the property, it would be greatly to the advantage of the estate if the tract could be sold as one parcel; that the tract is worth and ought to bring about \$400,000; that it cannot now be sold as a whole, for want of a purchaser, and that, in view of its value and character, a purchaser is not easily obtained and can only be got by effort. The widow and children have answered. They not only make no opposition to granting the desired authority, but join in requesting that it be given. By an instrument of writing dated October 30th, 1882 (the bill was filed nine days previously to that date), signed by them and addressed to the executors, they request the latter to take the necessary steps to obtain the loan of \$75,000 by a mortgage of all the testator's real estate in New Jersey, and pay off the debts with the money, and they express their readiness to join with them in all applications which may be necessary to obtain authority to make the mortgage. The prayer of the bill is for a decree directing the executors to execute a mortgage for \$75,000 upon the before-mentioned tract of thirty thousand acres, in order to pay and satisfy the debts presented to the executors, and settle the estate.

It will have been seen that by the will the testator provides that if it should seem necessary at any time to dispose of a portion of his real estate for the payment of his debts, it shall be done; and he thereby gives his executors power to make such disposition, either at public or private sale. Under the will, then, the executors have power to sell a portion of the testator's real estate to raise money to pay his debts, if it should seem to them necessary at any time to do so. This is a charge of his debts on

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all his real estate. *Cooke v. Farrand*, 7 Taunt. 122; *Rendlesham v. Meux*, 14 Sim. 249. By our statute, his debts are a charge on his lands. *Haston v. Castner*, 4 Stew. Eq. 697. By the will, the exercise of the power is not made to depend on the existence of an actual necessity, but on the apparent necessity in the opinion of the executors. The language is, "If it should seem necessary." The power, then, depends on the opinion of the executors, and the fact that they think it necessary will be evidenced by their conveyance. *Rendlesham v. Meux*, *ubi sup.* The only question is whether, under the power, they may raise the money by mortgage instead of sale.

It is to be observed that the testator did not by this provision contemplate a conversion for any other purpose than the payments of debts, nor to any greater extent than might be deemed necessary for that object. His design was to give his executors power to convert his real estate, to the extent that they might deem necessary, for the payment of his debts. Mr. Fisher lays it down that a power for trustees to mortgage is sometimes implied in a power to sell, viz., where, to satisfy the terms of the proposed object of the power—as, for instance, to raise a particular charge, subject to which the estate is devised—it is not necessary to make an absolute conversion. *Fisher on Mort.* § 435. The cases of *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Page v. Cooper*, 16 Beav. 396, and *Ball v. Harris*, 4 M. & Cr. 264, are authorities on this point. Where power of sale is given to raise a particular charge only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising the money should be preferred to the latter, for the obvious and sufficient reason that it is for the advantage of the estate that it should be adopted, and it is within the limits of the power intended to be conferred. It would be absurd, to say the least of it, to adhere so closely to the literal terms of the grant of power as to necessitate a sacrifice of the property, when by a reasonable construction that result could be avoided. Lord Langdale, M. R., in *Haldenby v. Spofforth*, 1 Beav. 390, in commenting on Lord Macclesfield's remark in *Mills v. Banks*, 3

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P. Wms. 1, that "a power to sell implies a power to mortgage, which is a conditional sale," says he conceives this to mean that where it is intended to preserve the estate, there, under a direction of sale, a mortgage will sufficiently answer the purpose. And Lord St. Leonards, in *Stroughill v. Anstey, ubi sup.*, says: "It ought, I think, to be considered that in a case where the trustees have a legal estate, and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorize a mortgage, yet where the circumstances would justify the raising of the particular charge by a mortgage, it must be, in some manner, in the discretion of the court whether it will sanction that particular mode or not. It may be the saving of an estate, and the most discreet thing that can be done, and as the legal estate would go, and as the purposes of the trust would be satisfied, I think it impossible for the court to lay down that in every case of a trust for sale to raise particular sums, a mortgage might not, under the circumstances, be justified." The rule is truly expressed by Mr. Hill, as follows: A power for trustees to sell will authorize a mortgage by them, which is a conditional sale, wherever the objects of the trust will be answered by a mortgage; as, for instance, where the trust is to pay debts or raise portions. But where the trusts declared of the purchase-money show that the settlor contemplated an absolute conversion of the estate, a mortgage will be an improper execution of the power. *Hill on Trustees* 475. In the case in hand it appears that the real estate subject to the power of sale cannot be sold to advantage except as a whole, and that to sell parts of it would greatly depreciate the value of the rest; that the property, as a whole, ought to bring about \$400,000, but cannot now be sold as a whole for want of a purchaser, and in view of its character and value a purchaser is not easily obtained and can only be got by effort. The money for the payment of the debts may be raised by mortgage of the property, and so sacrifice be avoided. The executors ask for authority to mortgage, and the widow and children, the beneficiaries under the will, join in the request. The desired authority should be given.

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CAROLINE PORTER

v.

CEPHAS M. WOODRUFF.

1. Where the relation of A to B is one of great trust and confidence, A's conduct will be regulated by a law of jealousy. He will not be permitted to keep anything obtained from B under the guise of a contract, unless his title is entrenched in the utmost good faith. It must have been acquired openly, and on a full and frank disclosure of every fact likely to influence B's conduct; and the conduct of A must be shown to be just and honest in every particular.

2. The general interests of justice, and the safety of those who are compelled to repose confidence in others, demand that the courts shall inflexibly maintain the rule declaring that an agent employed to sell cannot make himself the purchaser, nor, if employed to buy, can he himself be the seller.

3. The moment an agent ceases to be the representative solely of his employer, and places himself in a position towards his principal where their interests may conflict, no matter how fair his conduct may be in the particular transaction, he ceases to be that which his service requires and his duty to his principal demands.

4. In such cases the courts do not stop to inquire whether the agent has obtained an advantage, or whether his conduct is fraudulent or not, but if the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, the courts will not speculate concerning the merits of the transaction, but at once pronounce it void as against public policy.

5. The reason of the rule is, that owing to the selfishness and greed of human nature, there must, in the great mass of transactions, be a strong antagonism between the interests of the seller and buyer, and universal experience shows that the average man, when his interests conflict with his employer's, will not look upon his employer's interests as more important or entitled to more protection than his own.

6. The object of the principle is to elevate the agent to a position where he cannot be tempted to betray his trust. To guard against uncertainty, all possible temptation is removed, and the prohibition against the agent acting in a dual capacity is made broad enough to cover all his transactions.

7. The rights of a principal will not be changed, nor the capacity of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under authority to purchase or sell a particular article at a specified price.

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8. The right of a vendor of lands to a lien in equity for unpaid purchase-money, is now a part of the established jurisprudence of this state, and will be enforced, not only against the purchaser, but all who claim under him as volunteers or donees.

9. A trustee is bound to make safe investments, such as will yield a reasonable income, and a return of the principal when desired, and he ought not, as a general rule, to invest in second mortgages, but he will not be held personally liable simply because he has done so, in the absence of proof that loss has ensued or will probably ensue.

On bill, answer and proofs taken in open court.

Mr. Oscar Keen, Mr. S. H. Pennington and Mr. Thomas N. McCarter, for complainant.

Mr. John R. Emery and Mr. Henry C. Pitney, for defendant.

VAN FLEET, V. C.

This is a bill by a principal against her agent. The complainant charges the defendant with many acts of misconduct in the course of his agency, some of which constitute gross frauds. The relation of principal and agent was formed between the parties in January, 1873. The complainant's husband died November 29th, 1872. She was then about sixty-eight years of age, childless, and without experience in business. She lacked both a knowledge of business and an inclination to acquire it. Her husband, by his will, gave his whole estate to her. His personal estate amounted to about \$60,000. He had, by a writing, which has not been put in evidence, but the existence of which has been fully proved, recommended the defendant as a fit person to assist the complainant in the management of her estate. The defendant had been associated with the complainant's husband for many years as a ruling elder in the superintendence of the spiritual affairs of one of the most influential Presbyterian churches of the city of Newark. His reputation as a capable and trustworthy business man stood high. He was president of one of the more prominent fire insurance companies

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of the city of Newark. His high religious character, and the position of trust he occupied in the business community, were almost sure to give him the confidence of the most cautious person. Very shortly after the death of her husband, the complainant surrendered into the possession of the defendant all her papers and securities, and requested him to have the safe in which her husband had kept his securities, removed to his office, in order that he might manage her affairs with less inconvenience to himself. This he did. From this time forth until the latter part of December, 1879, the defendant exercised over the securities and moneys of the complainant a dominion almost as absolute as he did over his own. The complainant, in describing her relations to the defendant, says:

“I looked to the defendant for everything without anxiety; I just threw myself on his fidelity, as a child would on a parent, without questioning.”

And the defendant, speaking on the same subject, says that the complainant and he were on terms of close friendship and intimacy; that she looked upon him as her adviser, comforter and friend, and that what he did for her was done as a friend, and were such services as a son or brother might render for a mother or a sister, without expectation of compensation, except by way of gift.

This narrative shows that the relation between the parties was one of great trust and almost blind confidence on one side, and complete control on the other. The defendant, therefore, occupied a position towards the complainant where he was bound not only to deal with her honestly and justly, but to scrupulously avoid engaging in any transaction, in respect to her estate, in which his interests might be put in antagonism to hers. He was required, in all things relating to her estate, to subordinate his interests to hers, and carefully abstain from using his power and influence over her for his own advantage, and to her harm. The law by which he was bound to regulate his conduct is a law of jealousy, and under its wise provisions he can keep nothing that he has obtained from her, under the guise of a contract, to which

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he cannot show a title entrenched in the utmost good faith. His title must have been acquired openly, on a full and frank disclosure of every fact likely to influence her conduct, and his contract must be shown to have been just and honest in every particular.

The first of the several claims to relief presented by the bill, which I shall consider, is that in which the complainant charges that the defendant is liable for the profit made on the purchase and sale of certain railroad stock. Among the property which the complainant acquired, under the will of her husband, were sixty-seven shares of the capital stock of the Central Railroad Company of New Jersey. After this corporation became insolvent and passed into the possession of the chancellor, the complainant became very much troubled about what was best to do with her stock, whether to sell it or to keep it. She sought information in many directions, consulted the defendant almost daily, and after undergoing much perturbation of mind upon the subject, at last, under a strong fear that if she continued to hold it, the whole would be lost, she gave the defendant peremptory direction to sell it at \$16 a share. This direction was given about the 1st of May, 1878. The defendant did not sell the stock, but caused it to be transferred to his wife, and paid the complainant for it at the price it was then selling for on the market. The amount he paid was \$1,072. He did not tell the complainant that he intended to purchase the stock himself, or of his purpose to have it transferred to his wife, but, on the contrary, by his answer, he says that after he made up his mind to buy, he went to the complainant and told her that *a sale had been effected, or could be effected*, at \$16 a share. In his evidence, he says that the idea of purchasing the stock for himself, as a speculation, first entered his mind after he had received direction to sell it, and after he had had an interview with Vermilyea & Co., stock brokers of the city of New York, in which they told him that they thought the market price of the stock would advance. At the time he told the complainant that a sale had been effected, or could be effected, at \$16 a share, he did not tell her that he had consulted these gentlemen, nor what opinion

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they had expressed. After the stock was transferred, the defendant paid to the receiver in charge of the affairs of the corporation under the re-organization scheme, the sum of \$500, and in return received an adjustment bond, and also surrendered five shares of stock, and in return received an income-bond. On January 30th, 1880, he sold the sixty-two shares still standing in the name of his wife, for \$5,091.75. The defendant's wife had no beneficial interest in the transaction, she paid no part of the purchase-money, and received no part of the proceeds of sale.

The defendant's reticence under the circumstances was not only unnatural, but undutiful. It amounted to a concealment of information which, I think, he was bound to give. He knew that the complainant had long been in a state of painful anxiety about her stock, that she had been reaching out in almost every direction for help, and that she seized upon every scrap of information that came in her way with the greatest avidity; he knew, also, that her mind had been in a very unstable condition as to what it was best for her to do, and that she had great confidence in his shrewdness, as well as in his integrity, and that she would be likely to be strongly influenced by his conduct. I am thoroughly persuaded that he concealed from her the fact that he intended to buy for the purpose of inducing her to sell, believing that if he told her he intended to become the purchaser himself, she would at once refuse to sell.

This conviction is greatly strengthened by his subsequent conduct. Shortly after the stock was transferred, its market price began to advance, and the complainant expressed regret that she had sold, and applied to the defendant to know whether she could not get the stock back again. He told her she had spoken too late. He did not acknowledge that he was its purchaser, and frankly state, as I think he should have done, that he was unwilling to return it. Subsequently, when applied to for information as to whom the complainant's stock had been sold, he answered that he did not know, but said it had been sold through Vermilyea & Co. This statement, it will be perceived, involved something more than concealment. The evidence ren-

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ders it entirely clear, I think, that from the time the defendant made up his mind to buy the stock, up until the evidence of his purchase was discovered, he made a constant effort to conceal from the complainant the fact of his purchase. His motive for adopting this course originally was to prevent the complainant from retreating from the purpose to sell, and he afterwards found it necessary to adhere to it to escape her reproaches for not dealing with her openly and fairly.

The legal principle to be applied in deciding whether the defendant can successfully resist the complainant's claim, is too firmly established to warrant even the most astute and courageous counsel in attempting to overthrow it or to narrow its scope. The general interests of justice and the safety of those who are compelled to repose confidence in others alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer an agent but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interests as more important and entitled to more protection than his own.

In such cases the courts do not stop to inquire whether an agent has obtained an advantage or not, or whether his conduct

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has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against an agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed, nor the capacity of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud. *Benson v. Heathorn*, 1 You. & Col. 326; *Conkey v. Bond*, 34 Barb. 276, 36 N. Y. 427.

In pronouncing the judgment of the court of errors and appeals in *Staats v. Bergen*, 2 C. E. Gr. 554, 558, the present chief-justice has discussed this whole subject with his usual vigor and perspicuity. "The rule," just stated, he says, "is one of public policy. The trustee"—and here, I think, it should be said that the persons referred to are not simply those who are strictly entitled to be called trustees, but the term is used in its most comprehensive sense, and intended to embrace all persons who act in

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a representative capacity, whether, according to exact nomenclature, they are styled agents, factors, executors, administrators or trustees—"the trustee is not prevented from bidding for property which he himself sells, on the ground simply of a supposition of actual fraud, but because the law has established, *as an inflexible rule, applicable to every emergency*, that he shall not place himself in a situation in which he will be tempted to take advantage of his *cestui que trust*. This is a wise public regulation, intended to protect a species of property which otherwise would be constantly exposed to peculiar hazard. The trustee, therefore, must submit to this regulation, and if he does an act in violation of it, no matter how pure his intention may be, such act is voidable at the instance of the person whom he represents. * * * At these sales, then, the trustee is forbidden to purchase, because his interest, as such purchaser, is opposed to the interest of his *cestui que trust*, and he acts, therefore, under a bias in his own favor. Nor does this rule rest, to any considerable extent, in the fact that, in a particular line of cases, the trustee has peculiar opportunities for the practice of fraudulent acts with regard to the property in his charge. The rule, to be efficacious, must be general, and the law implies, therefore, that in all cases of trusts such opportunities may exist, and consequently the prohibition is universal. * * * So jealous is the law on this point, that a trustee may not put himself in a position in which, to be honest, must be a strain on him." The cases are numerous in which these principles have been enforced against persons acting in the capacity of agents. I shall cite only those most pertinent. *Ex parte Lacey*, 6 Ves. 625; *Brookman v. Rothschild*, 3 Sim. 153; *Rothschild v. Brookman*, 2 Dow & Clark 188; *Gillett v. Peppercorne*, 3 Beav. 78; *Moore v. Moore*, 5 N. Y. 256; *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.*

It is possible for an agent, dealing directly with his principal, to make a contract which the courts will uphold, but such transactions, to be maintained, must be characterized by the utmost good faith. There must be no misrepresentation, and an entire

* See *Dos Passos on Stocks* 213-226; *Audendroid v. Walker*, 11 Phila. 183.—
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absence of concealment or suppression of any fact within the knowledge of the agent, which might influence the principal; and the burden of establishing the perfect fairness of the contract, in such cases, rests upon the agent. *Condit v. Blackwell*, 7 C. E. Gr. 481. Such transactions are never upheld, unless it is clearly shown that there has been, on the part of the person trusted, that most marked integrity, that *uberrima fides*, which removes all doubt respecting the fairness of the contract. *Rothschild v. Brookman*, *ubi supra*.

My conclusion is, that the defendant is liable to the complainant for the profit made on the purchase and sale of the complainant's railroad stock.

The second claim to relief which I shall consider is that in which the complainant insists that she is entitled to have the sum which shall be found to be due her in the transaction just discussed, charged as a lien for unpaid purchase-money on certain real estate which she conveyed, at the defendant's instance, to the defendant's wife. This claim rests upon the following facts: In March, 1874, the defendant purchased a house and lot on High street, in the city of Newark, for a residence for himself, for the sum of \$15,000. On the 1st of April, 1874, he procured them to be conveyed to the complainant, and paid the purchase-money as follows: The complainant and defendant executed two bonds of \$4,500 each, which were secured by two mortgages, made by the complainant alone, on the property conveyed, and the complainant also assigned to the vendor a mortgage held by her against Leopold and Herman Graf for \$4,000, and the balance of the purchase-money, viz., \$2,000, was paid in cash. The defendant admits that at the time he made this payment he might have had \$2,000 of the complainant's money in his hands.

During the year immediately succeeding the conveyance, the defendant says he made improvements on the property which cost \$7,000. The complainant continued to hold the title to the property until she severed her relations with the defendant. On the severance of their relations, the complainant demanded that the defendant should take the title to the High street property, discharge her from liability on the bonds which she had execu-

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ted in his behalf, and return to her such part of the purchase-money as her money and securities had paid. This was done. The house and lot were conveyed to the defendant's wife January 7th, 1880, and the defendant then paid to the complainant, in cash, in satisfaction of the money and securities belonging to her, which he had used in paying for the house and lot, the sum of \$4,594.90. The funds he used in making this payment were the proceeds of the sale of the railroad stock, which the defendant had induced the complainant to transfer to his wife. Under the force of these facts, the complainant insists that inasmuch as the moneys which the defendant paid to her were the proceeds of her property, and were, therefore, in equity hers, and not his, that it should be adjudged that the consideration which the defendant agreed to pay for the conveyance to his wife has not been paid, and consequently that she is entitled to a lien as for unpaid purchase-money.

Two things are undisputed. First, that part of the consideration which the defendant was to pay for the conveyance to his wife, was to make restitution to the complainant, in money, of so much of her property as he had used, at the time of the purchase, in paying for the house and lot; and second, that in going through the form of making such restitution, he simply gave to the complainant what in equity was hers already. If the defendant, in going through the form of paying the complainant, had used money in his possession belonging to her, the legal nature of the transaction would have been so conspicuously clear that it would have been impossible to misunderstand it. So, too, if he had secretly converted one of her securities into money and handed that over to her as payment, though he might have deceived her for the moment, his act would not have constituted a payment, but a fraud. This is exactly what he did do. He converted property which in equity was hers, into money, and attempted to pay her with her own money. He attempted to use that which was hers as his, and to discharge his obligation to her by giving her that which he had attempted, wrongfully, to take from her and to vest in himself. Except we

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travesty reason and ridicule truth, it is impossible to call such a transaction a payment.

This conclusion makes it the duty of the court to declare that the whole of the consideration which the defendant agreed to give for the conveyance to his wife has not been given, and this places the complainant in a position before the court where she is entitled to the aid of the court in enforcing her equitable rights against the land conveyed. The right of a vendor of lands to a lien in equity for unpaid purchase-money, has been fully and repeatedly recognized by this court and is now a part of its established jurisprudence. This lien will be enforced, not against the purchaser, but against all who claim under him as volunteers or donees. *Graves v. Coutant, 4 Stew. Eq. 763.*

My judgment is that the complainant is entitled to a lien as for unpaid purchase-money, against the house and lot conveyed by her to the defendant's wife, to the extent that the defendant used the money of the complainant in paying the consideration he agreed to give the complainant therefor.

The third claim made by the complainant presents the question whether or not the defendant is liable for \$1,000 of the purchase-money of a lot of land conveyed by the complainant to one David Brackin, in July, 1874. The lot was sold for \$1,200, \$200 of which was paid in cash and the balance, as the complainant alleges, was to be secured by a first mortgage on the property sold. The defendant, she says, had charge of the whole matter, and, instead of securing the balance of the purchase-money by a first mortgage on the lot sold, accepted a second mortgage on another lot, and that since then the first mortgage has been foreclosed, the mortgaged premises sold and the whole of her money lost. I shall not restate or discuss the evidence pertinent to this branch of the case. It is enough to say that, according to my view, the evidence entirely fails to establish a case against the defendant. It should be said that it clearly appears that the complainant is entirely wrong in the facts on which she rests her right to relief. It was not the first mortgage that was foreclosed, but the one held by the complainant. At the sale of the mortgaged premises they were bid in by the so-

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licitor employed by the defendant, for the complainant, to foreclose her mortgage, for \$700. The complainant refused to take title to the mortgaged premises, and they were afterwards conveyed to the defendant's daughter by his direction, and he subsequently assumed control over them. The defendant paid the taxed costs of the suit and the expenses of the sale, but nothing more, though he procured the mortgaged premises to be conveyed to his daughter. In stating the account between the parties the defendant must be charged with the sum for which the premises were sold, and credited with whatever he has paid on account thereof.

The complainant also seeks to hold the defendant liable for making an improper or insecure investment of her moneys. In March, 1875, the complainant received from the sale of some land located in Pennsylvania the sum of \$6,000, and handed it over to the defendant to invest for her. The defendant, March 17th, 1875, deposited the money to an account he kept in one of the Newark banks, as trustee. He is unable to tell how many different trusts this account represented, or when this particular \$6,000 was disbursed, or to whom. On March 6th, 1875, William A. Pruden and Amos W. Austin executed a second mortgage on a lot in Commerce street, in the city of Newark, to the defendant as executor of Robert C. Stoutenburgh, deceased, for \$6,000. The defendant says he invested the complainant's money in this mortgage. The prior mortgage on this lot secured the sum of \$10,000. The defendant says, before investing the complainant's money in the mortgage just described, he told her it was a second lien, that he was satisfied the security was sufficient and that the mortgagors were good and prompt payers, and that she thereupon directed him to make the investment. The mortgage was not assigned to the complainant at the time the investment was made, but the defendant says he took it from the package containing the papers of the Stoutenburgh, estate and placed it among the papers he held for the complainant. The mortgage was not formally assigned until after the complainant had revoked the defendant's authority as her agent, and called upon him to surrender her property. The defendant made seven

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endorsements of interest on the bond after he says he placed the mortgage among the papers of the complainant; four of them are made by him as attorney, two as executor and one without any designation.

It is evident at a glance that the defendant's conduct in this transaction is open to the very gravest suspicion. The security, in the first place, was one that a trustee could not accept without rendering himself personally liable in case it proved to be worthless or inadequate. *Gilmore v. Tuttle*, 5 Stew. Eq. 611. The defendant, therefore, occupied a position in respect to this security which entirely disqualified him, as the trusted adviser of the complainant, from giving her such counsel respecting it as she was entitled to have. Simply placing the mortgage among the complainant's papers, without other evidence of her ownership, not only put her title to it in a condition of extreme jeopardy, but left the defendant free to use it, as occasion might seem to require, as a security belonging to both funds, and thus make it answer a double purpose. The defendant kept no account of his transactions on behalf of the complainant, and she was, therefore, deprived of the protection which the performance of that duty would have afforded her. The defendant's conduct in this matter deserves, as I think, the severest condemnation.

But while it appears to be very clear that the defendant's conduct in this transaction has been highly improper, still I think it equally clear on the proofs as they now stand that no case is established against the defendant which can be made the basis of relief to the complainant. It has not been shown that the mortgage in question is either a worthless or an inadequate security. No loss has as yet been sustained, nor has any attempt been made to show that the complainant must inevitably or will probably suffer loss. All that has been shown is that the defendant has invested the complainant's money in a second mortgage. I know of no authority which goes to the length of declaring that a trustee shall be liable, whether loss is sustained or not, simply because he has invested the funds in his hands in a second mortgage. He is bound to make safe investments, such as will yield a reasonable income and a return of the prin-

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cipal when required. If he does that, though the security he takes may not be the most desirable, he incurs no personal liability. He should not, as a general rule, invest in second mortgages; if he does, he takes the risk of being personally answerable in case loss ensues, but he is not liable, as I understand the rule, simply because he has made such an investment, if no loss has been sustained, and in the absence of evidence that any will be sustained.

The next claim made by the complainant is uncontested. Among the property which the complainant received under the will of her husband were ten shares of the stock of a corporation known by the name of the Peters Manufacturing Company. Dividends, in both cash and stock or bonds, were declared on this stock in 1873, 1874 and 1875. Those of 1873 were thirty per cent. in cash, and forty per cent. in stock; in 1874, forty per cent. in cash, twenty-five per cent. in stock, and thirty-five per cent. in bonds; and in 1875, thirty per cent. in cash, and twenty per cent. in bonds. The defendant collected all these dividends. He paid the cash dividends to the complainant, but had the stock and bond dividends issued to himself as trustee. His explanation or justification of his conduct in this matter is this: he says when the first stock dividend was declared, he inquired of the complainant what he should do with it, and that she replied he might do with it what he liked, or what he had a mind to, and that he understood her by this form of expression to say to him that she meant that he should take it as a gift. When the subsequent dividends were declared, he says he supposed that she entertained the same intention with respect to them, and he procured them also to be issued to himself, though he made no further inquiry of her respecting her purpose, and she made no further declaration of her intention. The defendant sold the stock and bonds thus obtained, in January, 1877, for \$1,300. But before making the sale, he had received on the stock so obtained by him dividends in cash to the amount of \$561. The defendant, by his answer, admits that he is liable for the value of the stock and the amount that he has received thereon in dividends, and says that he is willing to account to

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the complainant for the same, if she insists that he shall do so. She does so insist. This claim is one of the foundations of her bill. The defendant, in the accounting, must be charged with what he received on the sale of the stock and bonds, and also with whatever he has received thereon as dividends.

I shall dispose of the other questions at issue between the parties by simply stating my conclusions, without attempting to review the evidence or stating the argument upon which they rest.

1. The complainant is not entitled to a decree setting aside the deed made by her to the defendant's daughter as compensation for the defendant's services.

2. The defendant, in the accounting, is entitled to a credit of \$50 for money paid to the complainant in December, 1879.

3. The defendant, in the accounting, must be charged with the dividends received by him for the complainant on her stock in the American Insurance Company, for the years 1876, 1877 and 1878; also with three sums, of \$17.50 each, for unpaid interest on the Graf bonds and mortgages, due February 1st, 1873, August 1st, 1873, and February 1st, 1874; and also with \$6.20 which, in his account, he has erroneously charged against the complainant.

The account between the parties will be stated and settled by the vice-chancellor. Either party may bring on the hearing on the accounting on ten days' notice to the other.

The complainant is entitled to costs.

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CLEEF

v.

THE NORFOLK AND NEW BRUNSWICK HOSIERY COMPANY.

1. Whatever destroys free agency, and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influ-

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ence, whether the control be exercised by physical force, threats, importunity, or any other species of physical or mental coercion.

2. Undue influence is not measured by degree or extent, but by its effect.

3. When a deed is attacked on the ground of want of capacity in the grantor, the test is, did the grantor possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing?

4. A witness is not entitled to credit, whose testimony is inconsistent with the common principles by which the conduct of mankind is usually governed.

On final hearing on bill and answer and proofs taken before a master.

Mr. Socrates Tuttle, for complainants.

Mr. Woodbridge Strong, for defendants.

VAN FLEET, V. C.

The complainants seek to invalidate a deed made by their mother. If they are entitled to succeed in nullifying the deed just mentioned, they will be entitled to a like decree in respect to a deed made by their mother's grantee. And also to have a mortgage made by their father and mother, so far as it may affect their estate, set aside. The grounds alleged against the deed of their mother are want of capacity and undue influence.

The complainants are children of Jonathan Earle and P. Augusta Earle. Their father was treasurer of the Norfolk and New Brunswick Hosiery Company from 1868 to 1876. In the latter part of August, or the early part of September, 1875, it was discovered that during the period he had charge of the finances of the corporation, \$142,000 had been fraudulently abstracted. Jonathan Earle denied that he had personally misappropriated any of these moneys, or that he was guilty of any wrong in the premises, except carelessness, but charged that his son George, one of the complainants, was the embezzler, and stated that George had obtained the money abstracted by filling up checks which he (the father) had signed in blank, and had lost it in speculations in gold and stocks. At the time the defalcation was discovered, the mother of the complainants held

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title to a tract of land, situate in the city of New Brunswick, consisting of thirty-three lots, lying together and constituting a block.

Shortly after the discovery of the defalcation, Jonathan Earle offered to make restitution, and, as part of the means to that end, he proposed to procure a conveyance by his wife of the lots held by her to the president of the corporation, who should at once convey them to him, and that he and his wife should then execute a mortgage on them for part of the sum embezzled. This course was adopted, and on the 1st of October, 1875, a deed for the thirty-three lots was made by Mr. and Mrs. Earle to the president of the corporation, and he, on the same day, conveyed them to Mr. Earle, and thereupon Mr. and Mrs. Earle executed a mortgage for \$18,000 on the lots to the president of the corporation. Shortly afterwards, this mortgage was assigned to the corporation, and they still hold it. At about the time of the execution of this mortgage, Jonathan Earle gave other mortgages on real estate in this state and elsewhere, and transferred to the defendants other securities, which, together with the mortgage just mentioned, were sufficient, nominally, to cover the whole of the sum embezzled. Nearly all the other mortgages and securities which were passed over to make good the loss have proved worthless, and if the complainants are successful in this suit, the defendant corporation will find itself, at the end of this litigation, in a much worse condition than if no effort had been made to make restitution.

For nearly two years prior to the execution of the deed in controversy, Mrs. Earle had been afflicted with cancer of the womb. She died from the effects of the cancer on the 10th of December, 1875. The complainants allege, and attempt to prove, that at the time she executed the deed her disease had so far exhausted her physical powers, and so greatly impaired the vigor of her mind, that she was incompetent to make a valid deed. Estimating the evidence produced in support of this contention at its highest value, the most that can be said for it is that it merely shows that her memory was failing. This is not enough to establish incapacity. The test in this class of cases, when they

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are unmixed with fraud, is, did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing, or the business he was transacting? If he did, his act must stand. He may be old and forgetful or enfeebled by disease, or irrational on some topics, and yet possess sufficient mind to do the most important act, in respect to his property, of his life. The vital question always, in such cases, is, did he clearly understand what he was doing? The evidence here answers this question in the most satisfactory manner. The physician who attended Mrs. Earle through her whole illness says that at the time of the execution of the deed there had been no failure or impairment of her mind, that he could see. The deed was executed in the presence and under the direction of a member of the bar of this state of the highest respectability. He has related in detail all that transpired at its execution. I shall not restate his evidence; it is sufficient to say that, if his statement is believed (and it is uncontradicted), there can be no doubt that Mrs. Earle clearly and fully understood what she was doing, and that the deed was the free and well-understood act of her mind. Considered as a whole, the evidence in the case not only fails to prove want of capacity, but shows that the deed was the act of a mind, if not entirely unimpaired, possessing very nearly all of its original vigor.

The complainants also allege that the deed should be declared invalid because it is the product of undue influence, and they charge that their father is the person who wrongfully or unduly influenced their mother, and, what is still more remarkable, they produce him as the witness to prove the truth of their charge. Their case, on this point, rests exclusively on his testimony. By his testimony their case must stand or fall. Were it possible, under any condition of facts, to regard him as a trustworthy witness, his testimony should, in consequence of the fact that he stands self-accused of attempting to defraud that person whom, of all others, he was under the highest obligations to defend and protect, be sifted and analyzed with the utmost caution. His attitude before the court naturally excites suspicion. He admits that he has attempted to commit a fraud against his wife, but

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professes to have become penitent, and now wants to confess the truth that the wrong he has attempted may be remedied.

But remedied how? By withdrawing from persons whom he has made his creditors against their will, the very property which he has pledged to them, as security for their debt, and turning it over to his children.

The period within which he might have been indicted for his criminal abuse of his trust, has expired, and all fear of punishment is gone; he is insolvent, and if his evidence shall prove sufficient to overthrow this deed, all that his wife contributed to make good his immense defalcation, will be restored to his children, without the least danger of his ever being compelled to restore a dollar of the money abstracted. His position as a witness, it is manifest, is one of extreme temptation. But more, he is master of the situation, and swears without danger of contradiction. He testifies as to what occurred between his wife and himself when they were alone. His wife is dead, and she cannot, therefore, contradict him directly, nor fail to support his evidence in those particulars in which failure to corroborate him might furnish very cogent evidence that his story was an invention. His character and position alike demand that his testimony shall be examined with a jealous care and a watchful scrutiny.

All that can be safely said in the way of formulating a definition of what the law calls undue influence is to say that whatever destroys free agency and constrains the person whose act is brought in judgment to do what is against his will, and what he would not have done if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of mental or physical coercion. The extent or degree of the influence is quite immaterial, for the test is, was the influence, whether slight or powerful, sufficient to destroy free agency and render the act brought in judgment rather the result of the determination of the mind of another than the expression of the mind of the actor?

The party alleging undue influence must prove it, either directly or by proof of such circumstances as shall clearly warrant its presumption as a conclusion of fact. A deed which appears

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to have been executed under all the safeguards provided by law to protect the grantor against coercion and imposition, is entitled to stand on its own inherent strength. The grantee is not obliged to prove that it is honest or valid.

As already stated, the evidence of undue influence comes from the mouth of a single witness, and is stated with singular brevity. I quote it :

“In the early part of September in 1875, when my wife seemed to be feeling better, I told her that I had promised, that I had given my word, that I would mortgage her property on Livingston avenue ; she said that it was an agreement between us that it should never be touched during her life ; I said I had promised it, and it must be done ; it left her prostrated ; nothing more was said to her until I told her I was going after Judge Strong, to have him come that night for her to sign the papers, as I was going to the death-bed of my father the next morning ; she raised no objection at that time.”

At a later point in his evidence, the witness says that when he told his wife he was going for Judge Strong, he explained to her what the papers were that he wanted her to sign.

Nearly a month, it will be observed, elapsed between the two conversations here detailed. It was in the early part of September, when Mrs. Earle is notified first that her husband had promised to mortgage her property, and that it must be done regardless of her wishes ; and it is not until the evening of the 1st day of October that she is told that her husband intends to have Judge Strong come that night for her to sign the papers. In the meantime no pressure is exerted, nor influence exercised ; he said nothing to her, in the interval, on the subject. Now, if we suppose his declaration, I have promised it, and it must be done, operated, at the time, as a coercive influence, is it not clear, in view of all the circumstances, that sufficient time intervened between the two conversations to relieve her entirely from its power ? from the fact that he abstained from any subsequent mention of the subject, she would naturally conclude, long before the second conversation, that he had abandoned his purpose, and a recurrence to the subject would, therefore, be likely to affect her more seriously than the first mention of it. At all

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events, the interval between the two conversations was quite sufficient to relieve her from anything like coercive influence.

But is his story reasonable and probable? A witness is not entitled to credit whose testimony is inconsistent with the common principles by which the conduct of mankind is naturally governed.

This witness was in a situation of extreme peril. He was guilty of an enormous defalcation, and subject to criminal prosecution and to have his misconduct blazoned to the world. He had offered to make restitution. His motive in doing so was doubtless, in part at least, to prevent exposure and escape punishment. He could not make full restitution without the help of his wife. Her situation at that time, as he describes it, was so distressing as to make it his duty to treat her with the greatest tenderness and affection. Anything in his conduct towards her having the appearance of force or coercion, would not only have been cruel but would have been much more likely to defeat his purposes than to accomplish them. And yet he says that as soon as his wife manifested a disinclination to comply with his wishes he did not, as it would have been natural for him to do, if his description of the situation is truthful, by explanation and entreaty and the use of tender means, attempt to coax her to do what he wanted; but, on the contrary, he says he told her with a brusqueness that, in her situation, as he describes it, was almost brutal, that he had promised it and it must be done. The consequence was, as he says, that she became so prostrated that he did not dare or was not willing to mention the subject again until the hour for action arrived. And then, though he had done nothing in the meantime to bring her into a condition of mind more favorable to his views, and had no reason to believe that a second mention of the subject would not be attended with the same painful and dangerous consequences, without making any further effort, either to change her mind or to ascertain whether she is more inclined to comply with his wishes, he assumes arbitrarily that she will do what he wants, and the result shows that he was right. If Mrs. Earle's opposition to the fulfillment of his promise was as strong and decided as he says it was, it

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cannot be believed that she surrendered without cause or motive. It is evident, I think, the whole story has not been told. I am compelled to say, if it be true that Mrs. Earle received his announcement that he had promised to mortgage her property with as much opposition as he says she did, that I think it is quite incredible that he would, without further effort to bring her to his views or to ascertain whether her mind had undergone any change or not, have presumptuously announced that he was going for an officer before whom she must execute the papers that shortly before she had told him, with strong demonstrations of pain, she was unwilling to execute. A course of that kind would have expressed such a contemptuous disregard of her wishes and feelings as would most probably have rendered her opposition unconquerable. His story is so inherently improbable, and the character he has written for himself in this case renders him an object of such extreme suspicion, that I am unwilling by any judgment to deprive any person of his rights, especially rights evidenced by a solemn deed, on testimony so improbable and unsatisfactory.

The complainant's bill must be dismissed, with costs.

ELIZA J. WESTERFIELD

v.

WILLIAM E. WESTERFIELD.

1. Alimony and counsel fees were originally allowed in divorce suits, because the wife was without other means of support, or of obtaining the money necessary to defray her expenses in the suit.

2. When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either.

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On petition, depositions and master's report.

Mr. Theodore Ryerson, for complainant.

Mr. R. V. Lindabury, for defendant.

VAN FLEET, V. C.

The bill in this case is filed for maintenance, under the twentieth section of the statute concerning divorces. The complainant is now before the court asking for alimony *pendente lite*, and counsel fees. The parties separated in 1867, and have never since lived together. The husband, since the separation, has contributed nothing to the support of his family. He went to Texas shortly after the separation, and remained there until about three years ago. His wife, in the meantime, has resided in this state, or in the state of New York. The parties have five children, four daughters and a son, all above the age of twenty-one years. The eldest daughter is married. Her father resides with her. The other daughters reside with their mother, and are supported by her. The son supports himself. The defendant is fifty-seven years of age, badly broken in health, and without business. On this motion, I think I am bound to find that he has an annual income of about \$500. Since the institution of this suit, he has had sufficient property, judiciously managed, to produce an income of that amount. A large part of this property he has caused to be conveyed to the daughter with whom he resides. The wife has an annual income of \$1,400. Her actual income may exceed the sum just named; whether it does or not, the complainant has not informed the court. She has not submitted herself to examination as a witness.

There can be no doubt that it is the duty of a husband to support his wife. This duty flows out of the marriage contract, and does not at all depend on the wife's means or want of means. The husband's duty is the same, in this respect, whether his wife has property or not. And it is equally clear that if the husband refuses to perform this duty, by abandoning his wife, or separating himself from her, and refusing or neglecting to maintain and

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provide for her, this court may compel him to furnish suitable support and maintenance for her. But the court cannot give such relief to the wife until the husband has had his day in court, and been afforded an opportunity to contest her proofs and submit his own.

An application for alimony *pendente lite* stands now solely on the ground of necessity. Originally such allowances were made, in divorce suits, almost as a matter of course. At common law, by the marriage contract, the husband acquired complete control over all property owned by his wife at the time of the marriage, or which she might acquire during coverture. In such a state of affairs, unless the court required the husband to support his wife, and to furnish her with the means of prosecuting her suit or defending his, she would be left, during the litigation, both destitute and defenceless. She was, therefore, in almost all cases regarded as a privileged suitor, who had a right to call upon her adversary for both support and the means required to carry on the litigation on her part.

But she now occupies a much higher position in respect to property rights. She may now acquire and hold property as if she were a single woman, and may bind herself, by contract, in the same manner and to the same extent that she could if she were unmarried, except she is not qualified to enter into a contract of suretyship. The reason upon which the old rule was founded no longer exists, and when the reason of the law ceases, the law itself ceases. *Cessante ratione legis, cessat ipsa lex.*

The doctrine that a wife is not now of right, and independent of the fact that she has a sufficient separate estate, entitled to temporary alimony, is as well supported by authority as it is by reason. Chancellor Williamson, in *Marker v. Marker*, 3 Stock. 256, after stating the general rule that in actions for divorce the wife is a privileged suitor and entitled to counsel fees and alimony, says: "The rule originally rested upon the principle that the husband having by the marriage contract the control of the wife's property, she was destitute of the means of her own protection. The statute has changed the common law, and secures to the wife the ownership and disposition of property she may

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have at her marriage, or may acquire afterwards. When the wife is a suitor in court, the question will be, whether she has property independent of her husband, and the court will exercise its discretion in the allowance of alimony and costs, having reference to the respective pecuniary circumstances of the husband and wife." Mr. Bishop, in the second volume of his treatise on Marriage and Divorce, at section 394, says: "When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either." And Judge Rapallo, in delivering the judgment of the court of appeals of New York, in a recent case, says: "If the wife has sufficient means of her own, temporary alimony is not allowable. * * * The fact that a wife is destitute of means to carry on her suit and to support herself during its pendency, is as essential as any other fact, to authorize the court to award temporary alimony. This is not a mere matter of discretion, but a settled principle of equity." *Collins v. Collins*, 80 N. Y. 1.

It is plain, I think, if the rule just stated is applied, that this application must be denied. The wife has nearly three times the income her husband has. Her income is quite sufficient to afford her a comfortable support, and also to pay such legal expenses as it will be necessary for her to incur in the prosecution of her suit. There is, therefore, no necessity whatever that she should have additional aid. Besides, it appears that the wife has been very tardy in asking relief. She and her husband have been apart for over fourteen years; during that time she has supported herself; her wants or necessities are not shown to be greater or more pressing now than at any previous period—it would rather seem that they are less; if, therefore, her application is denied the court simply leaves her, until the termination of her suit, in the same condition in which she has voluntarily remained for the last fourteen years. The application must be denied

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CHARLES SPIELMANN

v.

AUGUSTE KLIEST.

1. An assignee of a lease for years employed an attorney in executing a mortgage on his interest in the demised premises. Several years afterwards the defendant employed the same attorney to investigate the title of the same premises before taking a mortgage on the fee.—*Held*, that the defendant was not bound by the attorney's former actual notice of the existence of the leasehold mortgage.

2. A lease for years contained a provision that the owner of the fee should pay the lessee, at the end of the term, the value of any buildings put up by the lessee on the demised premises, who afterwards erected buildings thereon. The lease was acknowledged and recorded as a deed. The lessee mortgaged his interest to the defendant during the term, which mortgage was duly registered as a mortgage of lands. At the expiration of the term, but while the lessee still remained in possession, the owner of the fee mortgaged his interest to the complainant.—*Held*, that the record of the lease and of the mortgage on the lessee's interest was constructive notice to the complainant, so as to render defendant's mortgage a prior lien on the buildings.

On final hearing on bill, answer and proofs taken before a master.

Mr. E. D. Gillmore, for complainant.

Mr. John C. Besson, for defendant.

VAN FLEET, V. C.

The decision of this case turns on a question of notice.

Joseph Spiess, on the 3d day of November, 1855, granted and demised, by formal deed, to Charles Boese, and to his executors, administrators and assigns, a term of ten years from the 1st day of May, 1856, in a certain lot of land situate in the city of Hoboken. The rent reserved was \$650. The lease provided that Spiess should purchase of Boese, at the end of the term,



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any and all buildings and erections of a permanent nature that Boese should, during the term, erect on the demised premises, at a valuation to be ascertained by two disinterested persons, one to be chosen by each of the parties, and in case the two could not agree, they should have the right to call to their aid a third, whose decision should be final. The lease was duly acknowledged by both parties, on the 28th of November, 1856, and recorded in the record of deeds for Hudson county, on the 6th of December, 1856. Boese, prior to 1860, erected on the rear of the demised premises, at a cost of over \$3,000, a two-story brick building, which has since been used as a bar and billiard-room. On the 11th of October, 1860, the lease, together with the building and all right to compensation therefor, was assigned and conveyed, by writing under seal, to Ferdinand Kapp. This instrument was also acknowledged and recorded as a deed. The date of its record is October 13th, 1860. On the 24th of October, 1862, Ferdinand Kapp executed a mortgage on his leasehold interest, also on his right, title and estate of, in and to the building erected on the demised premises by Boese, and on his right to the value thereof, to John Roemmeth and Andrew Leicht, to secure the sum of \$1,367.73, with interest. The mortgage so given was acknowledged on the 28th of October, 1862, and on the same day recorded in the record of mortgages of Hudson county. It has since been regularly assigned to the complainant.

The term granted by the lease expired on the 1st day of May, 1866, but Kapp, nevertheless, continued in possession of the demised premises from that date until the 5th day of May, 1873, as tenant, upon the terms specified in the lease to Boese, and paid rent accordingly. On the date last named (May 5th, 1873), the persons owning the fee of the demised premises conveyed their interest to Kapp, and on the next day (May 6th, 1873), Kapp and his wife executed a mortgage on the whole premises to the defendant, Auguste Kliest, to secure the sum of \$8,000.

The complainant's suit is brought for the purpose of procuring an adjudication that he is entitled to have his mortgage

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debt paid out of the money due for the building erected by Boese, and also that his lien is entitled to priority over that of the defendant.

This court has repeatedly decided that the erection of permanent improvements on the demised premises by a lessee, under a covenant that he shall be paid their value, gives him a lien on the demised premises for the value of the improvements, and that such lien is a purely equitable right, which can only be enforced by a court of equity. *Copper v. Wells, Sax. 10; Berry v. Van Winkle, 1 Gr. Ch. 269; Decker v. Clarke, 11 C. E. Gr. 163.* The principle upon which relief is given in such cases, seems to be this, that inasmuch as a valuable addition is made to the estate of the lessor, by his authority and under his promise that he will make compensation therefor (which addition must, by force of law, pass to the lessor on the expiration of the term), it is just that the sum he has stipulated to pay should be regarded as the purchase-money of the addition, and that the lessee should have a lien on the demised premises therefor, similar to that which the vendor of land has for unpaid purchase-money. Taking this principle as the standard by which the rights of the parties must be measured, the question presented for decision would be easily solved, if the litigants before the court were the original parties to the contract, or such as were limited to their rights.

The rights of the parties hinge on a question of notice. Did the defendant take her mortgage with notice, either actual or constructive, of the complainant's rights? The defendant swears that she did not have actual notice. The lease, and its assignment to Kapp, as well as the mortgage now held by the complainant, were all acknowledged before the person who was afterwards employed by the defendant to examine the title to the demised premises, and to report to her whether she could safely take a mortgage on them or not. He, unquestionably, had full notice of the complainant's rights. As a general rule, notice to an agent is notice to his principal, but to be effectual against the principal, the notice must have come to the agent while he was concerned for his principal, or in the course of his

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agency, or so soon before that it may fairly be presumed that the agent clearly recollected it when his agency was created. *Hiern v. Mill*, 13 Ves. 113; *Story on Agency* § 140. Several years elapsed between the execution of the last of these papers and the time when the defendant made this person her agent; she is not, therefore, bound by what her agent, doubtless, at one time knew, but which, most probably, he had entirely forgotten long before the defendant constituted him her agent.

The decision of the case, then, must depend on a question of constructive notice. The instruments on which the complainant's claim is founded were all recorded regularly and promptly. But this will not, in all cases, constitute notice. The registration of an instrument not required by law to be recorded, is considered a voluntary and inefficacious act, and is, in judgment of law, no notice. *James v. Morey*, 2 Cow. 246; *Graves v. Graves*, 6 Gray 391; *Villard v. Robert*, 1 Strobb. Eq. 393; 2 Lead. Cas. in Eq. (pt. 1) 205. The question then is, was the lease made by Spiess to Boese, a deed or conveyance of land within the meaning of the statute respecting conveyances, so as to entitle it to be recorded? There was no express statutory authority for the registration of leases until 1872. *P. L. of 1872* p. 93. This statute of 1872 cannot, I think, be regarded as a legislative declaration that the statutes in force at the time of its enactment did not embrace leases. The statute of 1872 may have been passed to clear up what was regarded as an obscurity or to dispel doubts. It is certain there is nothing on its face tending to show that the legislature, by its enactment, meant to declare that a lease for life was not a conveyance of lands.

The statute in force at the time the lease in question was made, declared that every deed or conveyance of or for any lands, tenements or hereditaments, to any purchaser of the same, * * * shall be void and of no effect against a subsequent judgment creditor or *bona fide* purchaser or mortgagee for a valuable consideration, not having notice thereof, unless such deed or conveyance shall be acknowledged or proved and recorded * * * within fifteen days after the delivery of the same. *Rev. Stat. 1846* p. 643 § 18. A lease for the life of the lessee has

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always been regarded as a grant of a freehold estate. Such leases would seem to be clearly within the plain letter of the statute. Blackstone defines a lease to be a conveyance of lands or tenements made for life, for years or at will. *2 Bl. Com. 317*. Cruise says a lease is a contract for the possession and profits of lands and tenements, or else it is a conveyance of lands and tenements to a person for life, for years, or at will. *Greenlf. Cruise 372 ch. V. ¶ 54*. A lease doth properly signify a demise or letting of lands common, or any hereditaments, to another for lesser time than he that doth let them hath in it. *Shep. Touch. 266*. And a demise, in its more technical meaning, is said to be a conveyance of lands for a term of years. *Comyn on L. & T., tit. Demise*. A lease is a contract in writing under seal, whereby a person having a legal estate in hereditaments, corporeal or incorporeal, conveys a portion of his interest to another. *Arch. L. & T. 2*. A lease is the grant of the possession of lands to a person for life, for years or at will. *Watkins on Conv. 425*.

A deed, to be entitled to registration under this statute, must be made to a purchaser. The language of the statute is, "every deed or conveyance of or for any lands, tenements or hereditaments, to any purchaser of the same." Is a lessee a purchaser? There are but two methods known to the law by which a person can acquire a right to the possession of lands, viz., by descent and by purchase. Purchase is defined to be the possession of lands and tenements which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. *2 Bl. Com. 241*. There are five different methods of acquiring possession by purchase: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. *Id. 244*. And among the instruments mentioned under the head of alienation, by which a right to the possession of lands may be acquired, leases are enumerated. *Id. 310*. And Cruise says that every lessee is a purchaser by his contract and covenants. *1 Greenlf. Cruise 403 ch. I. ¶ 80*.

In the light of these definitions, it would seem that there should be no doubt that a lease for a term of ten years is a con-

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veyance of lands within the meaning of the statute under consideration, and, as such, entitled to be recorded. But it may be said the books say that a lease for years confers no estate in the lands demised by it, for though the term granted by it may exceed the duration of many lives, yet it simply confers a term or a mere chattel interest. This, it cannot be denied, was the ancient view, and it is likewise undeniable that the ancient doctrine was founded on principles which have no application to modern times, or to society as it exists under a republican form of government. I think it is safe to say that in this commercial age, which reverences fact much more than it does fiction, and pays no special homage to any class of citizens, and bestows no extraordinary privileges on military men, a grant which gives to the grantee a right to the possession of lands for a term of three or five hundred years, would be esteemed every where a great deal more valuable, and entitled to much more consideration, than the grant of a term to run during the successive lives of any three mortals. And it would be so in fact. A different estimate of the dignity or value of the two grants rests on fancy and not on fact.

But this court is already committed on this question. The present chancellor, in *Decker v. Clarke*, 11 C. E. Gr. 163, held that our statute regulating the registry of mortgages embraces mortgages of leasehold interest, and authorizes their registration. That statute, it will be remembered, declares that every deed of mortgage or conveyance in the nature of a mortgage of or for any lands, tenements or hereditaments * * * shall be void against any persons subsequently acquiring an interest in the mortgaged premises, not having notice thereof, unless such mortgage is recorded. *Rev. p. 706 § 22.*

The chancellor, in deciding *Decker v. Clarke*, adopted the rule established by the New York adjudications. As early as 1807 the court of errors of the state of New York, in construing a statute requiring the registration "of mortgages of lands, tenements and hereditaments," held that a mortgage of a leasehold interest was within the reason and spirit of the statute, and that the record of such a mortgage constituted notice to subsequent

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purchasers and mortgagees. Chief Justice Kent, who pronounced the opinion of the court, says: "I admit that, by the old rule of law, the words lands, tenements and hereditaments would comprehend only freehold estates and not leases for years," but he afterwards declares that it does not follow that these words must receive the same restricted construction when found in a recent statute introducing regulations on a new subject. They are large enough to reach an interest for years as well as an estate for life. He further says that mortgages of leasehold interests come clearly within the reason and spirit of the statute because they come within the mischief which the statute was intended to remedy. *Johnson v. Slagg*, 2 Johns. 510. As chancellor, Kent subsequently expressed the same opinion in *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 603.

The deduction to be made from these adjudications is obvious. If a mortgage of a leasehold interest is entitled to registration, it follows, necessarily, that the lease, which is the foundation of the title, must also be recorded; especially is this so where both statutes use the same descriptive words to define what instruments shall be recorded. Besides, the registry of a mortgage made by a person having no title on record is without legal effect as notice, for the rule is firmly established that, in order to make the registry of a mortgage notice to persons subsequently acquiring an interest in the mortgaged premises, it must appear by the record of deeds that, at the time the mortgage was executed, the person executing it had title to the mortgaged premises. *Losey v. Simpson*, 3 Stock. 246.

In the case just cited, Chancellor Williamson said: "When one link in the chain of title is wanting, there is no clue to guide the purchaser in his search to the next succeeding link by which the chain is continued. The title on record is the purchaser's protection, and when he has traced the title down to an individual out of whom the record does not carry it, the registry acts make that the purchaser's protection." An adjudication which decides that a mortgage of a leasehold interest is entitled to registration, also decides, in consequence of the iden-

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tity of the words of the two statutes, that the lease on which the mortgage is founded is recordable.

The lease from Spiess to Boese was, in my judgment, entitled to registration under the statute in force at the time of its execution. Its record, therefore, operated as notice to all persons subsequently acquiring an interest in the demised premises.

It is an established rule of law that notice of a deed is notice of its contents. *Smallwood v. Lewin*, 2 McCart. 60; *Van Doren v. Robinson*, 1 C. E. Gr. 256. Notice of a memorial of any kind is notice of all its contents. *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Latouche v. Dunsany*, Id. 137. If a party has notice of a lease, he has notice of everything contained in it. If, for instance, there is a covenant to renew, the purchaser cannot object, if he has notice of the lease, that he had no notice of that particular covenant. *Taylor v. Stibbert*, 2 Ves. 439; *Hall v. Smith*, 14 Ves. 426. Chancellor Green, in *Van Doren v. Robinson*, held that notice of a deed was notice of an agreement contained therein that the grantee should, on the happening of a certain contingency, reconvey to the grantor.

Constructive notice, under the registry acts, is as efficacious as actual notice. The purpose of those acts is to make such notice the equivalent, in all respects, of actual notice. They declare that a delinquent or careless purchaser or mortgagee shall be assumed to know what he would have learned had he explored those sources of knowledge which the law has provided for his information. The fact that the term granted by the lease in question had expired before the defendant took her mortgage, cannot, in my judgment, change the rights of the parties. The record of the lease was an important link in the chain of title. It was a conveyance by the ancestor of the persons from whom the defendant's mortgagor derived his title. No examination of the title on record could have been made without discovering it. It was the defendant's duty to search the title on record, and she is chargeable with whatever knowledge she would have obtained by the performance of that duty. In no other way can effect be given to the great remedial purpose of the registry acts.

The complainant is entitled to a decree declaring that his

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mortgage is a lien, prior to that of the defendant, on the building erected on the demised premises by Boese. The evidence shows that the value of the building, at the time the lease expired, exceeded the amount now due on the complainant's mortgage. That is the time when the value of the building should be ascertained. *Berry v. Exrs. of Van Winkle*, 1 Gr. Ch. 390. The decree will direct the defendant to pay to the complainant the amount due on his mortgage, together with his taxed costs, within thirty days after service of a copy of the decree and costs, or in default of such payment, that the mortgaged premises shall be sold for that purpose.

EDMUND L. B. WALES AND THE FARMERS BANK OF
HARRISBURGH.

v.

JOHN B. LAWRENCE et al.

A creditor recovered a judgment against thirteen joint and several debtors, and issued an execution against them all, under which levies were made, ample to satisfy the judgment debt; twelve-thirteenths of the whole amount of the judgment had been paid by twelve of the defendants, each one paying one-thirteenth—*Held*, that, since the creditor could make the whole debt out of the property under levy, this court had no jurisdiction to entertain a bill filed by the creditor to set aside fraudulent conveyances made by the thirteenth debtor, (the defendant), in order to defeat the complainant's attempt to satisfy the remaining unpaid one-thirteenth of the judgment out of the defendant's property.

On final hearing on bill, answer and proofs.

Mr. David J. Pancoast, for complainants.

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Mr. Herbert A. Drake and Mr. Abraham Browning, for defendants.

VAN FLEET, V. C.

The question mainly contested in this cause is, whether, upon the admitted facts, the complainants have any standing in equity. They are judgment creditors. The complainant Wales recovered a judgment at law against the defendant Lawrence and thirteen other persons, on the 17th of May, 1877, for over \$30,000. His judgment is founded on a joint and several bond made by all the defendants. The corporate complainants, The Farmers Bank of Harrisburg, have also recovered a judgment at law against Lawrence and seven other persons. Their judgment is founded on a promissory note made by Lawrence and the seven other defendants. Executions, both original and *alias*, have been issued upon both judgments and levies made upon property sufficient to satisfy both. Thirteen of the defendants in the first judgment have paid thirteen-fourteenths of the amount necessary to satisfy it, and seven of those liable for the second judgment have paid seven-eighths of the sum due upon that. Lawrence has paid nothing. Lawrence, some time after the execution of the bond to the complainant Wales, and shortly before the making of the note to the corporate complainants, conveyed all his real estate to two of his brothers. He had previously, but subsequent to the execution of the Wales bond, executed a mortgage to one of his brothers. The property thus disposed of embraced nearly everything he possessed. He was insolvent at the time these conveyances were made. The two deeds and the mortgage are charged to have been executed for the purpose of defrauding his creditors. The evidence produced in support of the truth of this charge is very persuasive.

The defendants in the judgments at law stand to each other in the relation of co-obligors and joint promissors. The thirteen in the one case, and the seven in the other, are not sureties of Lawrence, but simply jointly liable with him. A mere in-

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spection of the levies will show that the property seized under the executions is abundantly sufficient, not only to satisfy the sums still remaining due, but to pay the sums for which the judgments were recovered. No legal obstacle stands in the way of the complainants collecting every penny they are entitled to, by the use of their legal remedy. In this condition of affairs, have the complainants any right to the aid of this court?

It is a well-established rule of equity jurisprudence that a judgment creditor is not entitled to the aid of a court of equity for the enforcement of his judgment, until he has exhausted his remedy at law. This is an indispensable preliminary, which he must show affirmatively, to entitle himself to a footing in equity. Said Chancellor Green, in *Robert v. Hodges*, 1 C. E. Gr. 299: "Equity will not, of course, grant its aid to enforce legal process. It must first appear that the legal remedy of the complainant is exhausted." The same principle was declared in *Swayze v. Swayze*, 1 Stock. 273; *Randolph v. Daly*, 1 C. E. Gr. 313, and *Bigelow Blue Stone Co. v. Mugee*, 12 C. E. Gr. 392. And to the same effect are the adjudications in *Clarkson v. De Peyster*, 3 Paige 320; *Cuyler v. Moreland*, 6 Paige 273; *Reed v. Wheaton*, 7 Paige 663; *Merchants and Mechanics Bank v. Griffith*, 10 Paige 519.

The judgment of the court of errors and appeals in *Dunham v. Cox*, 2 Stock. 437, is so apposite to the case in hand that I think I am bound to regard it as a conclusive authority on the question now before the court. The complainant in that case was a judgment creditor. By his bill he alleged that his judgment debtor had conveyed away, by voluntary deeds, a large part of his real estate for the purpose of defrauding creditors, but he also showed that under the execution which had been issued to enforce his judgment, a levy had been made upon other property belonging to his debtor, and though the value of the property so levied upon was not stated in the bill, its quantity and character made it entirely clear to the court that its value exceeded the amount due to the complainant on his judgment. Chancellor Williamson, in delivering the judgment of the court, said:

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“It is not enough for the bill to show that the debtor has made a fraudulent disposition of any particular portion of his property, to entitle the creditor to the aid of a court of equity. He must show that such disposition embarrasses him in obtaining satisfaction of his debt; for, if the debtor has other property, subject to the judgment and execution, sufficient to satisfy the debt, there is no necessity for the creditor to resort to equity. If his debt can be satisfied out of property upon which his judgment is a lien, it is only inviting useless litigation for him to question conveyances made by the debtor, which, however they may have been intended, do not operate as a fraud upon him. A court of equity interferes because its aid is necessary to assist the creditor in obtaining his legal rights. If there is property which the law places within his reach, free from embarrassment, to satisfy his debt, the aid of a court of equity is not required.”

The only distinction which it is possible to draw between the case just cited and the one under consideration, is this: In *Dunham v. Cox* the complainant had but a single debtor to look to for his debt, while here there are several, but this, while it may increase the complainants' chances that their legal remedy will be effectual, will not permit them to seek relief in equity so long as they have the power to get their money by the ordinary legal means. They are restricted to their remedy at law until that means of getting their money has been exhausted. And what is their remedy at law? To enforce the payment of their judgment by legal process. If they can get their money by that means, they do not need the help of equity, and equity can only aid them, in such cases, because its aid is necessary. The complainants cannot issue an execution against one, or less than the whole number against whom they have judgment. The law will not allow them to split up their remedy, by issuing an execution, first against one defendant, and then against another; they have no such remedy at law, but they must proceed against all, and until they have exhausted, against all, the means which the law provides, they are not in condition to require the aid of

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a court of equity against any one of the defendants, and cannot have it.

The defendant has, I have no doubt, attempted to commit a fraud against his creditors, but the complainants have no right to complain of it. His fraud has done them no harm. They can get their money of the persons who are legally liable for it, without the least difficulty, by simply using the means which the law has provided. So long as this is so, they will neither need, nor have they a right to ask, the aid of a court of equity.

The complainants' bill must be dismissed.

THE BOARD OF COMMISSIONERS OF SOMERVILLE

v.

THEODORE T. JOHNSON et al.

1. The bare legal title, with no beneficial interest in the land, is sufficient to enable the holder to maintain ejectment, even against the person for whom he holds the legal title.

2. But a trustee cannot maintain ejectment against his *cestui que trust* when the facts justify a presumption that he has surrendered the legal estate to his *cestui que trust*.

3. A *cestui que trust* may bring an action at law in the name of his trustee, whenever necessary for the protection of the trust property, and the trustee can neither release the right of action nor discontinue the suit, but he may ask indemnity against costs.

4. A deed which describes the land conveyed by it as beginning at a point on the side of a street, and thence running along the street, will, if the grantor owns the street, pass the land to the centre of the street, but such, of course, will not be its effect if the land described as a street is owned by some other person than the grantor.

5. All persons who have in the object or objects of the suit an interest, apparent on the record, are necessary parties to a suit in equity.

On demurrer to bill.

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Mr. S. B. Ransom, for demurrants.

Mr. James J. Bergen, for complainants.

VAN FLEET, V. C.

The defendants are seeking to recover the possession of certain lands by ejectment. It is not disputed that they hold the legal title to the lands in question. The lands were conveyed to their ancestor by deed untrammelled by any trust or condition expressed on its face, bearing date October 25th, 1809. The ancestor of the defendants died testate March 12th, 1828. By his will, he directed his executors to make over, by deed, to the board of chosen freeholders of Somerset county the same title that he possessed to the lands in controversy, and also that the deed should declare that it was made "for the benefit and behoof and use of the present and future owners of the lots laid off on the Davenport farm," and he then added, "it being for their use that I now hold the lands." His executors, it will be observed, are to convey *the same title* that he held—a complete divestiture is directed. The defendants are the testator's heirs-at-law. The fee of the lands not having been devised, descended to the defendants. They have the bare legal title, but no beneficial estate or right.

Such a title is, however, sufficient to enable them to maintain ejectment even against the actual beneficial owner. A trustee, as tenant of the legal estate, may recover in ejectment from his *cestui que trust*, who can make no defence to an action at law, but must seek his remedy in equity. *Brown* ads. *Combs*, 5 *Dutch*. 36; *Reade v. Reade*, 8 *T. R.* 18; *Shine v. Gough*, 1 *Ball & B.* 436. But equity regards the equitable owner as the actual owner, and deals with equitable estates as possessing the same qualities and incidents as legal estates. A *cestui que trust* may bring an action at law in the name of his trustee, whenever it is necessary for the protection of the trust estate, and the trustee can neither release the right of action nor discontinue the suit. He may ask indemnity against the costs of the action, but he

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cannot otherwise interfere in its prosecution. *Monmouth Ins. Co. v. Hutchinson*, 6 C. E. Gr. 107; 2 *Perry on Trusts* § 520.

It is not, perhaps, exactly accurate to say that a trustee may always, and under any condition of facts, maintain ejectment against his *cestui que trust*. He may, unless there is reasonable ground to presume that the legal estate has been surrendered to the *cestui que trust*. And the courts are always free to indulge in such a presumption whenever it appears that the *cestui que trust* is the only person interested in the trust estate, that the trust has been fulfilled and that the trustee should, in the proper discharge of his duty, have conveyed the legal estate. Courts of law, in deciding whether a surrender should be presumed or not, follow very closely the familiar rule in equity that that shall be considered already done which ought to have been done. *Obert v. Bordine*, *Spen.* 394; *Brown* ads. *Combs*, 5 *Dutch.* 36. But no such presumption can be made in favor of the complainants, for by the terms of the trust the legal title in no event is to be conveyed to them. It is to be conveyed to a trustee, who, the bill avers, has refused to accept. Hence, before the trust can be executed a new trustee must be appointed.

There can be no doubt, I think, that a valid trust was created by the will under consideration. By its terms, all the lands which, in dividing up the Davenport farm into lots, had been set apart for streets, and to which the testator held title, were to be conveyed to a trustee for the benefit and use of such persons as were or should become owners of the lots laid off on that farm. The complainants claim to be owners of such lots, and come, therefore, clearly within the description used to designate the persons who were to be benefited by the trust. As the beneficiaries of the trust, they have a right to ask a court of equity to establish and execute the trust. Under the facts stated, the complainants are without the least shadow of legal title to the lands in controversy. Davenport conveyed the streets to Johnson October 25th, 1809. At that date, so far as appears, Davenport had not conveyed a single lot—he still held title to them all—so that his conveyance of the streets to Johnson put the

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title in this condition : Davenport held title to all the lots and Johnson held title to all the streets.

It must be admitted that the doctrine is settled in this state that if a deed describes the land conveyed by it as beginning at a point on the side of a street, and thence running along such street, the deed will, by legal intendment, pass the land to the centre of the street. *Salter v. Jonas*, 10 Vr. 469. But such effect can only be given to the deed of a grantor who owns not only the lot expressly conveyed by it but also the land adjacent, described as a street. It has never yet been held that where the land conveyed as adjacent to a street is owned by one person and the adjacent land, described as a street, is owned by another, that a deed made by the first will pass the land of the other. The rights of the complainants to the lands in controversy are, unquestionably, purely equitable, and the complainants consequently can only have adequate protection in a court of equity.

But I am compelled to conclude that the present action is defective for want of necessary parties. The primary object of the bill is to have certain trusts, created by the will of William Johnson in favor of the owners of lots laid off on the Davenport farm, established and executed. Their execution will denude the defendants of the least pretence of legal title, and render them powerless to annoy the complainants further. The secondary object of the bill is to restrain the defendants from further attempting to recover the possession of the streets until the question of trust is decided. The will clearly confers a power upon the executors. They are charged with the duty of transferring the legal title to the trustee. The court cannot compel them to exercise the power unless they are before it as parties. I think they are indispensable parties. All persons who have in the object or objects of the suit an interest, apparent on the record, are necessary parties to a suit in equity. *Calvert on Part. 13*.

The board of chosen freeholders are also, in my opinion, necessary parties. They are the trustees designated in the will. The complainants, it is true, allege, on information and belief, that the board have refused to accept the appointment, but this is not sufficient to relieve them from the duty of bringing the

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board into court. The board can only act when assembled as a body, and the usual evidence of their action is their recorded proceedings. It may be that the board have not the requisite legal capacity to accept a trust of this character, but a judgment to that effect would be of no force against the board, unless it were a party to the suit in which it was pronounced.

I am also of opinion that the defendants in the other actions of ejectment are necessary parties. All persons having an apparent interest in the object of the suit are necessary parties. As already stated, the main object of this suit is to have the trusts created by the will established and executed. The trusts are that the lands are to be conveyed to a trustee, to be held by him for the benefit and use of the lot-owners. A common benefit is conferred. No attempt is made to define or particularize the uses or benefits which either individuals or classes are to take, but the design of the creator of the trust seems to have been that the benefits were to be enjoyed by the lot-owners jointly, or rather indiscriminately. I am unable to discover any legal reason why all the defendants, in the several actions of ejectment, could not have joined in a single bill. They are all lot-owners, or claim to be, either by legal or equitable title, and as such, are, by the plain words of the trust, entitled to its benefits. The argument of the complainants, on this branch of the case, proceeds upon the theory that the right of a lot-owner to the benefit of the trust, is confined to the street lying adjacent to his lot, but there is no such limitation of his right found in the will, and the court has no right to impose it.

I think a bill might have been so framed as not only to have embraced all the persons who had been sued in ejectment, but such other lot-owners as might, pending the controversy, be sued. If the complainants had sued on behalf of themselves, and such other lot-owners as might thereafter require the aid of a court of equity, I have no doubt that lot-owners, subsequently sued, could have asked to be made complainants, and after thus becoming parties, would have been entitled to protection by injunction. Such a course of practice, in a case not similar in its facts, but

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similar in principle, was sanctioned by Vice-Chancellor Wigram in *Lund v. Blanshard*, 4 Hare 290.

I think the demurrer must be sustained on the ground of want of necessary parties. None of the other objections are maintainable.

ELISHA M. FULTON

v.

JOHN GREACEN, JR.

A defendant claimed that a condition in a deed, which authorized his grantors to enter on complainant's lands and avoid a grant of a right to use certain water in case of the non-payment of the water rent, had been broken, and all of complainant's claim or right to the water thereby forfeited, and that therefore he was justified in cutting off or diverting the water from complainant's mill. The complainant claimed that, although the question whether it had been forfeited or not had not been settled at law, yet the defendant's deed contained a reference to the prior grant of the water under which complainant claimed, and therefore defendant had actual notice thereof; and further, that even if there might have been a forfeiture for want of prompt payment of the water rent, that the defendant or his grantors had waived that forfeiture by accepting such rent afterwards, and, further, that the injury to the mill by the diversion or deprivation of the water would be irreparable.—*Held*, that complainant was entitled to an injunction to prevent the threatened injury.

On order to show cause why injunction should not issue.
Heard on bill and affidavits and answer and affidavits.

Mr. Edward A. Day and *Mr. John W. Taylor*, for complainant.

Mr. Thomas N. McCarter for defendant.

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VAN FLEET, V. C.

The complainant claims to be the owner of a tract of land adjoining the Morris canal, in the township of Bloomfield, Essex county, on which there is a paper-mill. He is operating the mill. Part of the power he employs is supplied by water from the canal. The water is carried by a raceway across the lands of the defendant. The object of this suit is to have the defendant restrained from diverting the water from the complainant's mill. The defendant, by his answer, admits that he has manifested an intention to divert the water, by having measurements made with a view of putting gates in the raceway, so that he may control the water. He claims the right to deprive the complainant of the water. There can be no doubt that the water constitutes a very valuable, if not an indispensable, part of the power by which the complainant's mill is driven. If it is cut off, it is evident the complainant must suffer a loss that may very properly be considered irreparable. The injury against which the complainant seeks protection belongs, undoubtedly, to the class which it is the duty of courts of equity to arrest *in limine*.

The defendant disputes the complainant's right to the water. The right to use the water for power was originally granted by the Morris Canal and Banking Company to one Unangst. This grant was made in 1858. Unangst subsequently, in 1861, conveyed his rights and privileges to Jonathan W. Potter; and Potter, on the 1st of December, 1865, made the conveyance or contract on which the complainant bases his title. On the date last named, Mr. Potter conveyed a part of the lands which Unangst had previously conveyed to him, to Robert W. Southmayd and Charles A. McCracken. It is not shown, nor is it alleged, that the complainant's mill stands on the land so conveyed by Potter to Southmayd and McCracken, but it does appear that the tract which he claims constitutes his mill property embraces other land than that conveyed by Potter to Southmayd and McCracken. By the grant made by Potter on the 1st day of December, 1865, he granted to Southmayd and McCracken, and to their heirs and assigns, the right to use and employ the water supplied by the canal company, after the same had passed

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from the tail-race of his mill, as fully and beneficially as he was authorized to grant the same. An annual rent of \$450 was reserved, to be paid in quarterly payments, and it was stipulated by the grantees that in case default should be made in the payment of any quarter's rent, for three months after the same became due, the grantor should have the right to cut off the water, and the grant should become void, and the grantor should have the right to grant the uses and privileges thereby granted to any other person or persons. The rights and privileges thus created were afterwards conveyed by Southmayd and McCracken to Archibald T. Finn. Finn, by a deed dated August 23d, 1870, but not acknowledged until August 14th, 1882, conveyed them to the Silver Spring Paper Company. This corporation was organized under the laws of the state of New York and became insolvent in 1874, and thereafter failed to pay the rent reserved by the grant under which the water was supplied, and continued in default for more than a year. Under proceedings instituted in this court, a receiver of the corporation was appointed in March, 1877, who subsequently, in 1882, sold and conveyed the mill property to the complainant. The rights and privileges in controversy were not specifically mentioned in the notice of the sale, nor were they expressly enumerated in any of the papers relating to the sale, as part of the property to be sold, but, at the time of the sale, the water constituted part of the power by which the mill was driven, and had been so used for a long time before. The complainant took possession of the mill, as the tenant of the Silver Spring Paper Company, in January, 1876, and continued in possession, either as tenant of the paper company or of its receiver, up to the time of his purchase.

Jonathan W. Potter conveyed the lands over which the water is carried to the complainant's mill, together with the rights and privileges granted to Unangst by the canal company, to the defendant, on the 9th of December, 1881. His deed expressly declares that the lands described in it are conveyed, subject to the agreement made by Potter with Southmayd and McCracken and the stipulations therein contained, and the grantor reserves any claim he may have for water furnished to the Silver Spring

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company. All the rents which accrued between the time the complainant entered into possession, in January, 1876, and the date of the conveyance to the defendant, were paid by the complainant to Potter, and accepted by him. But since the defendant has been entitled to the rents he has refused to accept them. He claims that the default made by the paper company in 1874 effected a forfeiture of the grant, which he has a right to enforce. During the whole period the complainant has been in possession of the mill, whether he held it as tenant or owner, he has had the uninterrupted use of the water. During his occupancy the water has never been withheld or obstructed.

The defendant shows that the paper company, on the 4th of August, 1875, conveyed its mill property, without special mention, however, of the rights in controversy, to three trustees, upon trusts which required the trustees to hold the property conveyed for eight months and let the same, and apply the rents first to the payment of the expenses of the trust, and then to the payment of the debts of the corporation, and if at the end of that time the debts were not paid, to sell and convey the property, and apply the proceeds to the payment of its debts. It is alleged that the trustees took possession under the conveyance, but it is not alleged that they did anything further in execution of the power conferred by it. This summary, it is believed, exhibits all the facts material to the question now before the court.

The complainant's right to protection, by injunction, is resisted on the general ground that his title to the water in question is not clear. This objection is presented in two forms—first, it is said the complainant never had any legal title to the water; and second, if a good title was once held by the Silver Spring Paper Company, it was forfeited long before the complainant acquired his title.

It is undoubtedly true, as a general rule, that a person seeking to be protected in the enjoyment of real property by injunction must not only show a good title to the property, but also that he can only have adequate protection by an exercise of the prohibitory power of the court. He must show a good title to

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the property and a clear right to the remedy he asks. But this rule is subject to exceptions. There are cases in which it is the duty of a court of equity to interpose for the protection of the property in dispute, pending the determination of a litigation concerning the legal title. In such cases the court does not take jurisdiction for the purpose of settling the rights of the parties, but simply to preserve the property until the legal title to it is established. When a complainant invokes judicial aid for such a purpose he is not required to show an uncontestable legal title, but he makes out a sufficient case when he satisfies the court that his claim is a substantial one, and that there is reasonable ground for doubting the validity of the title of his adversary. He must also, of course, show a case of danger. The authorities supporting this doctrine will be found collected in the notes to *Kerr on Inj.* 196, 197.

The court is in the habit, in such cases, of comparing consequences, and whenever it is satisfied that, if it does not enjoin the defendant, it is probable the property, so far as the complainant is concerned, will be destroyed, it will not hesitate to exercise its power. In the words of Lord Cranworth, in *Shrewsbury and Chester R. R. Co. v. Shrewsbury and Birmingham R. R. Co.*, 1 Sim. (N. S.) 410, "where the alternative is interference or probable destruction of the property, there, of course, the court will be ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant." But the court will not interfere where the only injury likely to result to the complainant, if it refuses to act, is that he may be retarded or embarrassed in the litigation.

And in cases where the contest between the parties concerning the property in question is the fit subject of equity cognizance, and the complainant, when he comes for an injunction, also asks to have the disputed rights of the defendant and himself to the property in controversy settled, there, if a sufficient case of danger is shown, it is pre-eminently the duty of the court not only to prevent the destruction of the property, but to preserve it from injury, so that when it shall decide which of the parties is

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entitled to it, it may deliver the property to him in as perfect condition as it was when the litigation commenced. In such cases this court is not only bound to decide which of the parties is entitled to the property, but to preserve the subject of the litigation until the question of right is decided. For a proposition so obvious precedents need not be cited.

The application of these principles to the case under consideration is obvious. The water which the defendant admits he has manifested an intention to divert, and which he claims he has a legal right to withhold, forms an essential, if not an indispensable, part of the power by which the complainant's mill is operated. It has been used constantly, for many years, as part of the complainant's power, and cannot be withheld or diverted without badly crippling his mill. If it is withdrawn, the producing capacity of his mill will be greatly diminished and its value seriously impaired. But no appreciable harm will be done to the defendant if he is enjoined. He does not intend to use the water. If he is permitted to withhold it from the complainant, it will be simply for the purpose of allowing it to go to waste. Under this state of facts the duty of the court is plain. This is a case in which almost ruinous consequences will result to one of the parties if the court refuses to exert its power, while the other, by its interference, can suffer nothing beyond a temporary restraint upon the exercise of a bare legal right.

The question whether the defendant has a right to enforce the forfeiture claimed, is, in my judgment, entirely free from difficulty. At common law, none but parties and privies in right and representation, as the heir of a natural person, and the successors of a corporation, could take advantage of the breach of a condition in a deed. Neither the assignees, nor the grantee of a reversion, nor privies in estate, as he to whom the remainder is limited, could re-enter for condition broken. *Co. Litt. 214 a.* This rule of the common law was, however, changed by an early statute, which gives the grantee of lands "let to lease" the same advantages by entry for non-payment of rent, that the lessor might have exercised. *Rev. p. 167 § 79.* The defendant

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may therefore avail himself of a forfeiture which occurred antecedent to his title.

The grant under consideration, it will be remembered, provides that if default shall be made in the payment of any quarter's rent, for three months after the same falls due, it shall become void, and the grantor shall have the right to cut off the water, and regrant the same to any other person. A default such as by the literal terms of the grant effected its forfeiture, is admitted. Equity does not favor forfeitures; on the contrary, one of its earliest and most salutary inventions was to provide a remedy against their harsh injustice. If the case is not marked by any countervailing equities, it is now the common practice for courts of equity to give relief against a right to re-enter for non-payment of rent, on payment of the rent in arrear. They do so on the theory that the clause of forfeiture is simply intended as a penalty to secure the payment of the rent, and if the lessor gets his rent, with interest and costs, he gets all he can, in justice, ask, and should not, therefore, be permitted to avoid the lease. *Kerr on Inj.* 83; *Thropp v. Field*, 11 C. E. Gr. 82.

But the complainant does not ask to be relieved, on equitable terms, from a forfeiture. He stands on higher ground. He insists that the lessor has, by his own act, extinguished any right of forfeiture which may at one time have existed. The fact is substantially undisputed that the lessor accepted rent, accrued subsequent to the forfeiture. The complainant swears to it, and there is nothing on the part of the defendant which can be regarded as an effectual denial.

The acceptance by a lessor of rent accrued subsequent to the forfeiture, with notice of the breach on which the right of forfeiture rests, has, from a very early date, been held to be a waiver or extinguishment of the right of forfeiture. *Marsh v. Curteys*, Cro. Eliz. 528; *Harvie v. Oswel*, Id. 572.

The reasons for the rule were very forcibly stated by Lord Mansfield in *Goodright v. Davids*, Coop. 803. He said: "Upon the breach of the condition, the landlord had a right to re-enter. He had full notice of the breach and does not take advantage of

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it, but accepts rent subsequently accrued. That shows he meant the lease should continue. Cases of forfeiture are not favored in the law, and where the forfeiture is once waived, the court will not assist it." It has even been held that an absolute, unqualified demand of rent, accrued subsequent to the forfeiture, amounts to an extinguishment of the forfeiture. Baron Parke so declared in *Nash v. Birch*, 1 M. & W. 402, and Baron Bramwell said the same thing in *Croft v. Lumley*, 6 H. of L. Cas. 672; and in *Dendy v. Nicholl*, 4 C. B. (N. S.) 376, it was held that bringing an action for rent, accrued subsequent to the forfeiture, was a waiver of the right of re-entry. Where the lease, in plain terms, provides that it shall be void, or become void, if the lessee fails to pay rent, or keep any other covenant, a breach does not render it *ipso facto* void, but merely gives the lessor a right to avoid it, which he may avail himself of or not, as he may choose to elect. A breach, in such case, renders the lease voidable, but not void, and if the lessor, with notice of the breach, afterwards accepts rent, which accrued subsequent to the breach, the law understands his acceptance as a decisive and final election not to avoid the lease, but that it shall be continued. *Arnsby v. Woodward*, 6 Barn. & Cress. 519; *Bowser v. Colby*, 1 Hare 109; *Gatehouse v. Rees*, 4 Bing. N. C. 384. So decisive is his election, as indicated by acts, that if he brings ejectment to recover the demised premises, he is precluded, after service of the declaration in ejectment, from maintaining an action for rent accrued subsequent to the service of the declaration, on the ground that he has, by his own act, ended the term and avoided the lease, and therefore it is impossible that any rent can accrue under it. *Jones v. Carter*, 15 M. & W. 718.

On the facts now before the court, it is obvious that the forfeiture claimed has been extinguished. It is proper, I think, to remark, in order to indicate that the matter has not been overlooked, that, in my judgment, there is grave reason to doubt, even if it were conceded that no fact exists from which a waiver of the forfeiture could be decreed, whether the defendant is in a position which will permit him to take advantage of a forfeiture

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incurred antecedent to his title. The conveyance which confers the rights on which he stands in this case was made subject, by express words, to the grant under which the complainant asserts title to the water in question. I think it may well be doubted, whether the defendant can now successfully claim that he is entitled to hold the lands acquired by that conveyance, free from a burden which his deed recognizes, and which it says he shall take them subject to.

The complainant is entitled to an injunction, restraining the defendant from diverting the water from his mill.

HENRY I. CODDINGTON

v.

THE EXECUTORS OF CHARLES BISPHAM, deceased.

1. There is no estate applicable to the payment of legacies until the testator's debts are paid.

2. Though a creditor may be barred of his action against the executor of his debtor, he is entitled to a remedy against his debtor's legatee, if the legatee has received his legacy.

On application for money in the hands of a receiver appointed by the court.

Mr. R. E. Chetwood, for creditor.

Mr. H. K. Coddington, for legatee.

VAN FLEET, V. C.

The question in dispute between the parties to this application is, whether certain moneys under the control of the court, and which represent the rents received from certain mortgaged premises, shall be paid to the person who holds the mortgage thereon,

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or to the legatees of the mortgagor? The facts out of which the controversy arises may be summarized as follows: Three legatees under the will of Smith Coddington, deceased, brought suit in this court against the executors thereof, charging that they were mismanaging and wasting the estate under their control, and praying that they might be required to account here, that the estate might be settled here, and the legatees paid under the direction of this court, and also for the appointment of a receiver. Among the property which the executors were charged with mismanaging was a lot, with a dwelling thereon, situate in the city of Rahway. They were charged with collecting the rents and wrongfully refusing to apply them to the discharge of the taxes assessed against the house and lot. The house and lot were subject to a mortgage of \$2,000 executed by the testator. Shortly after the bill was filed, a receiver, to take charge of the house and lot and collect the rents, was appointed with the consent of the executors. Afterwards, the mortgage was foreclosed and the house and lot were sold, under a decree of this court, for \$1,200 less than the amount decreed to be due on the mortgage. The receiver has accounted, and there remains in his hands of the rents received a balance of over \$300. It is admitted that the expenses of the administration and all the debts of the testator have been paid, except the balance due on the mortgage, and that the only persons who have any right to the balance in the hands of the receiver are the mortgage creditor and the legatees under the will of the mortgagor.

Counter-claims to the moneys are made. One of the legatees asserts his claim on affidavit and notice, and the mortgage creditor makes his claim by petition, in which he asks that he may be made a party to the suit instituted by the legatees, and after being so admitted that the moneys may be ordered paid to him.

When the matter was first fully opened, so that the nature of the opposing claims could be clearly seen, I thought it proper to intimate to counsel that it was probable neither of the parties could successfully claim the moneys, and that if they were disposed of in a strictly legal way, they would have to be ordered paid to the mortgagor's executors, in order that they might be

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put in due course of administration. Both counsel at once said that nobody wanted that course adopted; that if the moneys reached the hands of the executors, it was quite probable they would be lost to both creditor and legatees, and that in view of that fact, and because the amount in dispute was so small, that if proceedings were taken to have the executors removed, and some other representative of the testator appointed in their place, a large part of it would be consumed in legal expenses; they had agreed to bring the matter informally to the attention of the court, and all they desired was an opinion whether, in the due administration of the fund, it should be paid to the mortgage creditor or to the legatee. All matters of substance, as well as of form, standing in the way of reaching that question regularly, and deciding it so as to bind the parties, were to be considered waived.

On the question so presented, I do not think there can be two opinions. The money in dispute represents income from the property which was pledged to pay the mortgage debt; the money is in the possession of a tribunal to which both claimants have appealed for aid—the legatee to be protected against the wrongful conduct of the executors, and the mortgagee for the collection of his debt—and in disposing of the money, that tribunal must have a careful regard for the relative rights and position of the parties. The legatee stands simply in the rights of his testator, and he, in this case, is a debtor, and that too by the decree of this court. If he were the claimant, and it appeared, as it now does, that he stood, by the decree of this court, indebted to the other claimant, in a sum largely in excess of the sum in the possession of the court, it could scarcely be regarded as respectful for him to ask the court to hand the money over to him, and let its decree go unperformed. Such a request might very properly be regarded as a solicitation to the court to allow its decree to be contemned before its face. His legatee cannot stand a whit higher. He must trace his right through his testator, and if the court would not give the money to his testator, it should not give it to him.

And of what advantage to the legatee would an order be that

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the money should be paid to him? There is no estate properly applicable to the payment of legacies until the testator's debts are paid. Legatees have no rights, as such, until the creditors of the testator are satisfied. A legatee is not entitled to the payment of his legacy until he has given a refunding-bond. And, though a creditor may be barred of his action against the executor of his debtor, he is entitled to a remedy against his debtor's legatee, if the legatee has received his legacy. *Rev. p. 765 § 67.* A payment should, under no circumstances, be ordered to be made to the legatee, except on condition that he first executed a refunding-bond, and if he received the money upon such terms, it would do him no good—for he would be bound to return it—unless he is in such indigent condition that his bond is worthless, and then to order the money paid to him, would, to state the truth plainly, be handing the money over to him, that he might retain it against his testator's creditor. That the court cannot do.

As between the two claimants the creditor is entitled to the money.

ABRAM B. WYCKOFF

v.

DANIEL J. NOYES et al.

1. A farm was purchased at a sheriff's sale by one P., with the money of J., at whose direction P. conveyed the farm to F., who gave a mortgage thereon to A. and one to W., and then a deed to J., which was, in fact, a mortgage. Subsequently, F. conveyed the farm to N. J. afterwards bought W.'s mortgage, and had it assigned to and foreclosed by A. It also appeared that J. had other encumbrances on the farm prior to W.'s mortgage.—*Held*, that N. could not have the decree of foreclosure on W.'s mortgage assigned to him, on paying the amount, and be subrogated to the rights of J. thereunder, without also paying J.'s prior encumbrances.

2. Where J. is the real complainant in a foreclosure of a mortgage on lands, and A. the ostensible one, and the county records show a prior mort-

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gage on the same lands, standing in the name of A. (although it is proved never to have been delivered), and there is also a deed to J., which is, in fact, a mortgage, and the foreclosure bill makes no reference thereto, a sale of the premises under the decree will not be allowed until after the character and validity of the other encumbrances shall have been determined.

On hearing on petition, order to show cause and depositions.

Mr. H. C. Pitney, for petitioner.

Mr. S. H. Little, for Abram B. Wyckoff and Jacob F. Wyckoff.

VAN FLEET, V. C.

This is an application by the owner of the equity of redemption of mortgaged premises, or a person claiming to be such owner, for permission to pay off the complainant's decree and to be subrogated to his rights. The following are the facts: In March, 1880, Jacob F. Wyckoff furnished H. C. Pitney, Esq., with money to purchase certain liens existing against a farm in Morris county, called the Stiles farm. The farm was afterwards sold by the sheriff, and Mr. Pitney purchased it and paid the purchase-money with the money previously furnished by Wyckoff, and took the title in his own name. He did so pursuant to Wyckoff's instruction. He held the title to the farm subject to a trust in favor of Wyckoff, which imposed upon him the duty of conveying the farm either to Wyckoff or Wyckoff's nominee. In obedience to Wyckoff's direction, Mr. Pitney, on the 27th of May, 1880, conveyed the farm to Elizabeth Fitzgerald, and she, on the delivery of the deed to her, and pursuant to an arrangement with Wyckoff, executed a bond and mortgage to Abram B. Wyckoff, for \$3,000, and another to Catharine M. Williams, for \$1,200, and then conveyed the farm, by deed absolute on its face, but intended as a mortgage, to Wyckoff. All these papers were delivered to Jacob F. Wyckoff. Subsequently, and on the 16th of November, 1880, Elizabeth Fitzgerald conveyed the farm to Daniel J. Noyes, the petitioner.

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On the 16th of November, 1881, Jacob F. Wyckoff purchased the mortgage made by Elizabeth Fitzgerald to Catharine M. Williams, and procured it to be assigned to Abram B. Wyckoff, and then had the suit brought in which the decree under consideration was made.

The application is resisted. It is first said that the deed from Elizabeth Fitzgerald to the petitioner passed nothing. This claim is made, not on the ground that the prior deed made by Elizabeth Fitzgerald to Jacob F. Wyckoff was intended to have effect as an absolute conveyance, as distinguished from a mortgage, but because the conveyance from Mr. Pitney to Elizabeth Fitzgerald passed the land subject to the trust under which Mr. Pitney held it, and the deed made by Elizabeth Fitzgerald to Jacob F. Wyckoff must, therefore, no matter what the understanding of the parties may have been, have effect as an absolute deed, in order that the trust may be executed. But this view is obviously founded on a mistake. The mortgaged premises were freed from the trust by the conveyance from Mr. Pitney to Miss Fitzgerald. Under the trust, Mr. Pitney had merely a ministerial duty to perform, viz., to convey either to Jacob F. Wyckoff or to his nominee. A conveyance to either would free the land from the trust. The papers make it clear that Miss Fitzgerald was not only Wyckoff's nominee, but his purchaser. The land was conveyed to her by Wyckoff's direction; the deed to her is founded on a consideration of \$2,500, which is acknowledged to have been paid; in addition, she incurred personal obligations to Wyckoff's creditors to the extent of \$4,200, and then conveyed the land to him as security for the residue of the purchase-money. There can be no doubt that a conveyance to the *cestui que trust* would have freed the land from the trust, and a conveyance to his purchaser, for a consideration moving to him, must, on principle, be equally efficacious to disentangle the land. Though this suit was brought in the name of Abram B. Wyckoff, he is only the ostensible complainant. Jacob F. Wyckoff is the real complainant. His money purchased the mortgage on which the suit is founded—he instituted the suit, and doubtless devised the plan for its conduct. If

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subrogation is decreed, the decree will clothe the petitioner with the rights of Jacob F. Wyckoff. Now, it is admitted that Jacob F. Wyckoff holds one or more liens against the mortgaged premises in addition to the mortgage which the petitioner seeks to control. The petitioner does not offer to pay them. He simply asks to be permitted to pay the decree, and to be subrogated to the complainant's rights under it. I do not think a junior encumbrancer has a right, as a general rule, to be subrogated to part of the liens held by a prior encumbrancer, even if they are distinct, and were created at different times, and were originally made to different persons, provided they stand prior to the right or lien of the person seeking subrogation. He must take all or none. And I regard it as certain that the rights of an owner of the equity of redemption are not greater in this respect.

Subrogation is a pure equity ; it is sometimes spoken of as a benevolence ; it will never be decreed at the expense of a legal right or when it will work injustice. I can find no instance in which it has been enforced as to one of two liens held by the same creditor, both of which were prior to the lien or right of the person seeking subrogation. In *Saunders v. Frost*, 5 Pick. 250, a bill was filed by two of the three persons who held a third mortgage, to redeem the first two and to be subrogated as to them. Frost held the first two mortgages and was in possession of the mortgaged premises under them. He was also entitled to one-third of the amount secured by the third. Chief-Justice Parker, in stating the terms upon which the complainants would be entitled to subrogation, said : " Frost took a common interest with the other two in what remained after satisfaction of the first two mortgages, and was equally bound with them to clear off those encumbrances provided he would enjoy any interest under the third mortgage. The two plaintiffs then have a right to treat him as mortgagee of the first mortgage and as assignee of the second, and by tendering what is due, to have possession of the estate without regard to his interest in the third mortgage, which interest may be settled in a future process. If he is content with those two debts, he may receive the whole ;

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but if he claims indemnity under the third mortgage, he must pay his proportion of the sum necessarily paid to make it valid."

It is manifest, I think, if Frost had been solely entitled to the debt secured by the third mortgage, the court would not have required him to surrender the mortgaged premises until the debt secured by that mortgage was paid, as well as those secured by the two prior ones. *Davis v. Winn*, 2 Allen 111, and *Frost v. Yonkers Bank*, 8 Hun 26, are in the same line.

Besides, to put the petitioner in the place of Jacob F. Wyckoff as to one of his liens, but compelling him to retain the other, will place the petitioner in a position where he may practice against Wyckoff the very injustice he fears Wyckoff will do to him. But the petitioner offers to promise not to use the decree, in case subrogation is decreed, except as the court may think proper to allow him to use it. This, however, cannot help him. He must stand on the inherent equity of his case. He cannot create equities by promises. If he is not entitled to what he asks, independent of his promises, he cannot establish a right by promises.

In case subrogation is decreed, the substitute is put in all respects in the place of the party to whose rights he is subrogated. *Sheld. on Sub.* § 1. He may use the decree in the same manner that the person in whose favor it was pronounced might. But it is said the decree is under the control of the court, and after subrogation, the court may allow it to be used or not, as it may deem just. It is unquestionably true that the court may always control its decrees, but the control it may exercise is a judicial control—a control regulated by established rules. After a decree that mortgaged premises shall be sold to pay the mortgage debt, the court cannot arbitrarily say, in the absence of sufficient legal reason, that the decree shall not be enforced, nor is its power at all increased in this respect because it has put some other person in the place of the person in whose favor the decree was originally pronounced.

The person in whose favor the court pronounces a decree, ordinarily has a right to hold it until it is discharged by payment. The court seldom compels him to take his money in order that it may put some other person in his place, except that such course

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appears to be necessary to protect the other person's rights, or to save his property, and not then unless substitution can be effected without injury to the person displaced.

As it appears to me, it is just as necessary that Wyckoff should be allowed to retain control of the decree to prevent injustice being done to him, as it is that the petitioner should be subrogated to prevent Wyckoff from using it to the petitioner's disadvantage. In this condition of affairs Wyckoff has a right to stand on his legal rights and hold his original position, and the court has no right to dislodge him.

But this conclusion does not necessarily dispose of the case. I have already remarked that Jacob F. Wyckoff must be regarded as the real complainant. He is, unquestionably, responsible for the manner in which the suit has been conducted. And there can be no doubt that it has been so conducted as to give him an unfair advantage over the petitioner. To allow the mortgaged premises to be sold under the present decree, while the character and amount of the other liens, and which of them are real and which simply pretentious, are undetermined, will be to compel the petitioner to abandon all effort to save his property, and thus possibly compel him to bear a serious loss, or otherwise to engage in a struggle of hazard with Wyckoff, with all the advantages decidedly in favor of Wyckoff, in consequence of his greatly superior knowledge of the real facts of the case. There is a mortgage on record, standing prior to the one on which this suit is founded. It purports to have been made to Abram B. Wyckoff, the ostensible complainant in this cause, to secure \$3,000, but the proofs show that it was never delivered, and that Abram B. Wyckoff makes no claim under it. Though Jacob F. Wyckoff was fully cognizant of all the facts, no allusion is made to this mortgage in the bill. It is difficult to account for this omission, for an adjudication settling whether this mortgage was a lien or not would seem to have been quite as important to Wyckoff as to the petitioner, unless we believe that Wyckoff desired to purchase the mortgaged premises himself, and, to that end, thought it was best that as much doubt and uncertainty as possible should be thrown over their actual state

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and condition, in order that persons not as well informed as himself might be deterred from competing with him for their purchase. Wyckoff also knew that the instrument under which he claims to hold the mortgaged premises is not, in truth, what it purports to be on its face—it purports to be an absolute deed, but it is, in truth, as he now confesses, a mortgage—yet no mention of this fact is made in the bill. The bill, in this respect, is deceptive.

To allow the mortgaged premises to be sold until it is first determined whether the \$3,000 mortgage is a lien or not, and also whether Wyckoff's deed is a deed or a mortgage, and if a mortgage, what is due on it, will be to allow Wyckoff, in the name of another person, to use the power of the court to accomplish an inequitable purpose. This, of course, cannot be permitted. The party seeking relief in a case of this kind is not required to make out a case of surprise, as that term is usually understood, but his right to relief rests on the fact that his adversary is attempting to make an inequitable use of the power of the court.

The proper relief to be given in this case is to set aside the interlocutory and final decrees, and to allow the petitioner to answer. The petitioner may take such an order.

WILLIAM L. ELKINS

v.

THE CAMDEN AND ATLANTIC RAILROAD COMPANY et al.

1. After the issue of common stock by a railroad company, a supplement to its charter was passed, which authorized the issue of preferred stock, on the following conditions: "That when so issued, * * * the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." In some years, dividends of seven per cent. or less were declared on the preferred stock alone, and in

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other years, such dividends were declared on both the preferred and common stock.—*Held*, that a holder of the preferred stock was not entitled to annual dividends thereon at a fixed rate, but only to dividends out of the annual profits, but when such profits had been earned, he was entitled to a dividend of seven per cent. therefrom, before any dividend could be paid on the common stock.

2. The silence or failure of a former owner of such preferred stock to object to the declaring of any dividends on the common stock until after he had been paid seven per cent. on his own, will not estop the present owner thereof from asserting his claim to re-imbursement to that extent out of the future profits.

On application for an injunction. Heard on bill and affidavits and answer and affidavits and order to show cause.

Mr. David J. Pancoast and Mr. Samuel H. Grey, for complainants.

Mr. Peter L. Voorhees and Mr. B. Williamson, for defendants.

VAN FLEET, V. C.

The defendants in this suit are the Camden and Atlantic Railroad Company and its thirteen directors. The object of the suit is to restrain the defendants from doing two things: First, from paying a dividend on the ordinary stock of the company until the full amount of dividend due on the preferred stock has been paid; and second, from issuing any additional stock, either ordinary or preferred.

The defendant corporation was chartered in 1852, with a capital of \$500,000, and liberty was given to increase its capital to \$1,500,000. The capital was divided into shares of \$50 each. The road was opened for traffic in July, 1854. Shortly after the corporation commenced business it was found to be so much embarrassed financially as to require legislative aid. On the 7th of February, 1856, a supplement to the charter was approved, authorizing the corporation to issue the additional stock of \$1,000,000 which it had liberty to issue under its charter as preferred stock, the shares to be the same in amount as the ordi-

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stock. In defining the rights of the holders of the preferred stock, the supplement declares :

"That when so issued and declared to be preferred stock, the holders thereof respectively shall be entitled to receive dividends on the same *not to exceed seven per centum per annum*, before any dividend shall be set apart or paid on the other and ordinary stock of said company."

Of the twenty thousand shares of preferred stock so authorized to be issued, seventeen thousand six hundred and thirteen have been issued, aggregating a value at par of \$880,650, and leaving unissued two thousand three hundred and eighty-seven shares. Of those issued, the complainant holds seven thousand eight hundred shares, worth, at par, \$390,000. Of the ten thousand shares of ordinary stock which the defendants were authorized to issue, seven thousand five hundred and forty-eight have been issued, representing a capital, at par, of \$377,400, and leaving unissued two thousand four hundred and fifty-two shares. Of the ordinary stock, the complainant holds two thousand six hundred and forty-six shares, worth, at par, \$132,300. Of the total capital of the corporation of \$1,258,050, the complainant holds \$522,300. The answer says that he has acquired all his stock since the 10th day of February, 1882.

No dividends were declared on either class of stock until 1872. In that year a dividend was declared on the preferred stock, but none on the ordinary stock, and the same thing was done again in 1873. In 1874 a dividend of seven per cent. was declared on the preferred stock, and three and one-half per cent. on the ordinary stock. But from that date on until November 1st, 1879, dividends of exactly the same per centum, or at the same rate, were declared at the same time on both classes of stock. On the date last named, another dividend was declared on the preferred stock, but none on the ordinary stock; and in April, 1880, a dividend of the same amount, payable in preferred stock, was declared on both classes of stock. No dividend since then, until the one in question, has been declared. On the 21st of September, 1882, the directors declared a dividend of four per cent. on the preferred stock, and three per cent. on the ordinary

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stock. The complainant insists that this action of the directors, so far as it seeks to appropriate a part of the profits to the payment of a dividend on the ordinary stock before he has received seven per cent. on his preferred stock, not only for the last current year, but for each year since the issue of his stock, is a violation of his rights, which should be enjoined. This constitutes his first title to relief.

There are certain legal principles pertinent to this discussion which I think are so firmly established that they may be taken for granted, without argument or the citation of authorities: First, stockholders are not creditors, and until the winding up of the corporation, are entitled to nothing from it but a distribution of its net earnings; second, dividends can only be paid out of profits; third, calling stock preferred stock does not, *per se*, define the rights of such stock, but in order to determine in what respect the holder of such stock is to be preferred to the holder of ordinary stock, resort must be had to the statute or contract under which it is issued; and, fourth where the statute or contract under which preferred stock is issued, declares or promises that the holder of such stock shall receive a dividend of a fixed and certain rate per annum, without limiting the annual sum to be paid as dividend to profits earned or made within a designated period—as, for example, that he shall receive a dividend of seven per cent. per annum before any dividend shall be paid on the ordinary stock—there the preferred stockholder is entitled to seven per cent. per annum from the date of the issuing of the stock held by him, whether profits sufficient to pay him each year are made or not; and if, at the first division of profits, sufficient shall not have been made to pay him the whole sum due, he may carry the arrears due him over to the next dividend, and continue to do so until he has received the whole sum due him, calculated at seven per cent. per annum from the date of the issue of the stock held by him. The principle last stated rests mainly on English adjudications, and has in that country received the approval of such judges as Lord Cranworth, Lord Hatherly, Lord Justice Knight Bruce and Lord Justice Turner. The cases in which it has been enun-

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ciated are *Henry v. Great Northern Railway Co.*, 3 Jur. (N. S.) 1117; *S. C. on appeal*, 1 De G. & J. 606; *Crawford v. North Eastern Railway Co.*, 3 Jur. (N. S.) 1093; *Sturge v. Eastern Union Railway Co.*, 7 De G. M. & G. 158; *Matthews v. Great Northern Railway Co.*, 5 Jur. (N. S.) 284. The doctrine of all these cases, on the point under consideration, was approved in *Boardman v. Lake Shore and Michigan Southern Railroad Co.*, 84 N. Y. 157.

Two of the English judges liken the case to a partnership agreement, where two of three copartners agree that the third shall, out of the profits of their ventures, have a certain fixed per centum per annum on his capital, before any part of the profits are payable to them. And they both hold that in such case, there being no agreement that what is payable to the third should be paid out of the profits made during the current year, or any other designated period, it would be clear that he would have a right, at all times, to say to the other two, "I have not received the five per cent. or ten per cent. per annum on my capital which, by the terms of our agreement, I am entitled to, and, until I get it, not a farthing of the profits can go to you."

The construction given by the English courts to such statutes and contracts rests, principally, on the fact that they plainly provide for the payment of a dividend at a fixed rate each year, and do not attempt to limit or restrict the dividend which the preferred stock shall be entitled to, to the profits of the year in which the right to the dividend accrues. The great distinction between the two classes of stock seems to be this: ordinary stock is not entitled to a dividend until sufficient profits to warrant a division of profits have been earned, but preferred stock, issued under a statute containing a provision that a dividend of fixed amount shall be paid each year, is entitled to a dividend each year at the stipulated rate, even if no profits are made, but the holder of such stock cannot compel the payment of his dividend until the corporation has a fund on hand which can properly be regarded as profit.

Now, it will be observed, that the statute under which the preferred stock held by the complainant was issued, makes no

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provision for the payment of an annual dividend at a fixed and certain rate; indeed, I think it may well be doubted whether it makes provision for the payment of an annual dividend at all, except profits exist sufficient to warrant the payment of a dividend. Dividends, as already remarked, can only be paid out of the profits. The statute under consideration says that the preferred stock shall be entitled to receive a dividend, *not exceeding* seven per cent. per annum, before any dividends shall be paid on the ordinary stock. But suppose no profits are made for three or five years after the issue of the stock, is the preferred stockholder entitled to dividends during that period? if so, at what rate? and who is to fix the rate? and on what principle is the rate to be fixed? In ordinary cases the directors of a corporation are charged with the duty of declaring dividends, and in the performance of that duty they must have regard to the amount of the profits, and also to the sum necessary to be reserved out of the profits to meet contingencies, and to be expended in repairs and improvements. In case there are no profits, it is clear they have no power to declare a dividend. It is equally clear that no rate is fixed by this statute. It would seem, therefore, to be certain, as a matter of logic, that no right to a dividend can accrue to the preferred stock until the pecuniary condition of the corporation is such as to render the declaration of a dividend a duty. The maximum of the preferred dividend is specified. It may be seven per cent.; it cannot be more; it may be less, or it may be nothing. No minimum is specified. This being the case, is it not obvious that the legislature meant, and the persons who originally took the stock must be assumed to have understood, that the amount, within the limit prescribed, payable annually in dividends on the preferred stock, would depend wholly upon the amount of profits which, in the proper and judicious management of the affairs of the corporation, could be divided among its stockholders? There is not the slightest warrant for saying that the legislature meant that the preferred stockholder should have seven per cent. per annum on his stock, whether the net earnings which could properly be applied in the payment of dividends were sufficient to

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give him a dividend at that rate or not; or that if the net earnings of any year were not sufficient to give him a seven-per-cent. dividend, he should have a right to carry any deficiency which might exist over to the next year. On the contrary, the language employed renders it very clear, I think, that what the legislature meant was this: The rights of the preferred stockholder should depend upon the pecuniary condition of the corporation; if there were no profits during the current year, he was not entitled to a dividend; if there were, he was entitled to a preference to the extent of seven per cent.; if the profits were not sufficient to give him seven per cent., he was entitled to a dividend at such rate as they were sufficient to pay, but not to carry any deficiency or arrears over to a subsequent division of profits. In other words, his rights were to be governed and regulated each year by the pecuniary condition of the corporation at the close of the year.

The conclusive argument against the complainant's claim, that he is entitled to yearly dividends of definite amount, whether profits were made or not, is, that the statute under which he asserts his claim neither promises nor secures to him a dividend of any amount or at any rate, but simply declares that his dividend shall not exceed a certain sum.

Adopting the construction just stated as the rule by which the complainant's rights are to be measured, it is manifest that he is entitled to have that part of the action of the defendants enjoined, which attempts to appropriate part of the net earnings to the payment of a dividend on the ordinary stock before a dividend of seven per cent. has been paid on the preferred stock. If they have profits sufficient to divide seven per cent. on the preferred stock, or any sum less than seven, they are bound, I think, to give it to the preferred stock, and have no right to appropriate anything to the ordinary stock until they have divided seven per cent. to the preferred stock.

I am not required, nor would it be proper, on an intermediate proceeding like that now before the court, to express an opinion respecting the complainant's right to be re-imbursed out of future earnings for such part of the profits as have been improperly

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appropriated as against the preferred stockholders, to the payment of dividends on the ordinary stock, further than to say that I do not think that the preferred stock can, by any just use of equitable rules, be held to be precluded or estopped from asserting its right of preference given by the statute simply because the persons who held it at the times those dividends were declared, allowed them to be declared and paid without objection or question. It requires something more than simple silence and non-action, in such a case, to raise an estoppel against the assertion of a right secured by a statute. *Matthews v. Great Northern Railway Co.*, 5 Jur. (N. S.) 284.

The other ground upon which the complainant asks the protection of the court needs no discussion. He says he has been informed and believes that the defendants intend to issue a part or the whole of the unissued stock, both preferred and ordinary, for the purpose of maintaining themselves in office, and preventing him and those who think as he does from exercising such control over the affairs of the corporation as they are entitled to exercise. To this the defendants answer that while it is true that some months ago the president was authorized by resolution of the board to sell stock of the company at par, they have no such purpose now; that there is no necessity now for any purpose whatever to issue additional stock, and that they have no intention or design to make any further issue. If what they say is true, and the court is bound so to regard it, the complainant is in no danger and needs no protection.

The complainant is entitled to an injunction restraining the payment of the dividend declared on the ordinary stock on the 21st day of September, 1882, until a dividend of seven per cent has been paid on his preferred stock.

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WILLIAM L. ELKINS

v.

THE CAMDEN AND ATLANTIC RAILROAD COMPANY et al.

1. A contract between two connecting railroads for the division of earnings, according to the distance which each corporation shall have carried the passenger or freight for which the money is paid, is within the discretionary powers of the directors, and its execution cannot be enjoined at the instance of a stockholder, who does not show a dishonest or fraudulent purpose on the part of the directors in making such contract, and that he will be injured thereby.

2. A stockholder applied for an injunction to prevent the execution of a contract between connecting railroads, for the division of earnings on freight and passengers carried over such roads, making only the company of which he was a stockholder, a defendant.—*Held*, that the other railroad company with which the proposed contract was to be executed, was a necessary party.

On application for an injunction. Heard on bill and affidavits and answer and affidavits and order to show cause.

Mr. David J. Pancoast and *Mr. Samuel H. Grey*, for complainant.

Mr. Peter L. Voorhees and *Mr. Benjamin Williamson* for defendants.

VAN FLEET, V. C.

This is one of a series of suits brought by the complainant against the same defendants for the purpose of securing, as the complainant alleges, protection against the wrongful and fraudulent acts of the defendants. The complainant is the owner of a majority of the capital stock of the Camden and Atlantic Railroad Company, and he seeks by this suit to restrain the directors of that corporation from entering into a contract with

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the Philadelphia, Marlton and Medford Railroad Company for the transportation of passengers and freight, also from executing a similar contract with the New Jersey Southern Railroad Company, and also from making sale of eight hundred shares of the capital stock of the Philadelphia, Marlton and Medford Railroad Company, the property of the defendant corporation. The complainant charges that since he obtained a majority of the stock of the Camden and Atlantic Railroad Company, the directors of that corporation have manifested a hostile feeling towards him, and evinced a determination to maintain their power and control over the affairs of the corporation, in opposition to his views and interests, and in proof of this he cites several instances of alleged misconduct on their part, which it is unnecessary to consider, except as they may tend to show the motives which may influence the directors in doing the acts he seeks to have enjoined.

All the acts sought to be enjoined are, in my judgment, clearly within the powers committed to the directors of the defendant corporation, and therefore, unless the complainant has clearly demonstrated that in doing them they will be controlled by a fraudulent or dishonest purpose, and that injury will result to him, it is clear he has no case. The defendants were created a body corporate and given power to construct and operate a railroad. Under the power thus conferred they have implied authority not only to make such contracts as are necessary to the accomplishment of the purposes for which they were created, but also such as may tend to promote and foster their main enterprise. The courts will, as a general rule, presume that contracts made by a railroad corporation, which appear to be designed to promote its legitimate and profitable operation, are within the limits of the powers, and if their validity be assailed, will require the assailant to assume the burden of demonstrating that fact. *Pierce on Railroads* 500.

The bill shows that the road constructed by the Philadelphia, Marlton and Medford Railroad Company intersects the road of the defendants at Haddonfield, in the county of Camden, and is a valuable tributary of the defendants' road. It then charges,

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on information and belief, that the president of the defendant corporation, who is also the president of the Philadelphia, Marlton and Medford Railroad Company, intends to enter into a contract with the last-named corporation, for the transportation of passengers and freight over the defendants' road for a long term of years, on terms most favorable to the Philadelphia, Marlton and Medford Railroad Company, and prejudicial to the rights and interests of the defendant corporation. But how, why or in what particular respects the contract is unjustly liberal to the one corporation and prejudicial to the other, is not shown. The answer is quite as meagre in its facts. It simply denies, in general terms, any intent on the part of the defendants to enter into a contract of the character or for the purposes stated in the bill.

The bill shows that the road of the New Jersey Southern Railroad Company connects with the road of the defendants, and affords the defendants' road its only communication, by rail, with the city of New York and intermediate points. It then says that heretofore the defendants have had their passengers and freight, for points beyond the eastern terminus of their own road, carried over the road of the New Jersey Southern Railroad Company, under contracts continuing in force only one year, but that the defendants have recently agreed with the New Jersey Southern Railroad Company, on the terms of a contract, for the same service, running for a period of ten years, the terms of which are most favorable to the latter company, and that a contract embodying such terms is in course of preparation, and, unless enjoined, will be executed. The defendants, by their answer, admit that they have entered into negotiations with the New Jersey Southern Railroad Company, looking to the conclusion and execution of a contract by which each of the two corporations will become bound to carry the passengers and freight of the other, for points beyond their own lines, over its line; that the contract is in course of preparation, and will provide that the fares and tolls received for such service shall be divided according to mileage, or the distance each shall carry such passengers and freight over their respective lines. The answer is silent as to the period the contract is to run.

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There can be no doubt that the question as to the expediency of making a contract which is within the capacity of the corporation, is committed to the judgment of the managers of the corporation, by whom alone it can act, and so long as they keep within the power committed to the corporation, and act in good faith, with honest motives and for honest ends, their acts are valid, though the result may show that what they did was unwise or inexpedient. Neither do I think it can be doubted that contracts of the kind sought to be interdicted in this case can lawfully be made by railroad corporations owning and operating connected lines, and, if free from fraud, must be upheld by the courts.

The validity of such contracts has, as I interpret the authorities, been maintained by this court, and also by the court of errors and appeals. *Sussex Railroad Co. v. Morris and Essex Railroad Co.*, 4 C. E. Gr. 13; S. C. on appeal, 5 C. E. Gr. 542.

It is true the judgment pronounced by Chancellor Zabriskie in the case last cited was reversed by the court of errors and appeals, but not on the ground that his views respecting the power of railroad corporations operating connected lines, to make such contracts, were erroneous, but because by the construction he adopted he extended the contract sought to be enforced in that case, to a railroad not in existence at the time the contract was made, and to construct which no legislative authority had been granted. Mr. Justice Bedle, in delivering the opinion of the court of errors and appeals, says that the question then before the court was not one analagous to that which would be presented had two railroad corporations made a contract to carry passengers and freight for each other for a share of the joint fares and tolls received; for in such case, in his judgment, the contract would be valid for the reason that each would have contracted concerning its own authorized business, and such a contract could not be held to be *ultra vires*.

Chancellor Zabriskie had previously said, in the same case, in the court below, that it had for years been the constant practice of railway companies in this country to run in connection, passing freight and passengers over a number of lines forming one

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route, and to divide the receipts by an arbitrary schedule fixed upon, and not always, or in most cases, giving to each the share earned on it. He further said that he had no doubt that the contracts by which such connections were formed were valid and effectual in law, and that it was competent for the parties to make them for any period of time not in excess of the duration of their charters.

But the contracts under consideration are not assailed on the ground of want of power to make them, but for fraud. That is a charge which the party making it is always required to establish by convincing facts. And what are the facts here? The complainant charges that the directors are hostile to him, and determined to thwart him in his efforts to prevent their reelection. A simple glance at the position of the parties towards each other can leave little doubt of the truth of this charge. But what of it? Hostility and opposition are not sufficient, standing alone, to prove fraud. Before the court can interdict the making or execution of these contracts, it must be convinced that the directors intend to make them for a fraudulent purpose or in furtherance of a fraudulent scheme, and that the fraud will injuriously affect the complainant. The directors have a right to make the contracts, and can only be prevented from exercising their right in that respect because they intend to exercise it fraudulently to the prejudice of the complainant. But it is said that the directors mean to have the contracts under consideration embrace a much longer period of time than their previous contracts for the same service covered, but they have a right to make contracts of this kind for any period of time they may think expedient. Besides, it may be that the other contracting party may have insisted, in view of the strife existing among the stockholders of the Camden and Atlantic Railroad Company, that if a new contract was entered into, it must be for such period of time as would afford them adequate protection against the injurious consequences possible to result from the strife. Cautious and judicious persons, in view of the actual state of affairs, would have been very likely to have insisted upon some such protection.

But there is a more certain test by which the complainant's

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right to an injunction may be tried. Will he be harmed if these contracts are made? As a general rule the contract itself, in this class of cases, furnishes the best test whether it is made for an honest or dishonest purpose. If it is unequal, giving much and getting little, or displays a liberality which throws around the transaction the appearance of a gift rather than a bargain made at arm's length, it may well be believed some other motive than the advancement or protection of the interests of the stockholders caused its negotiation. But here, so far as the terms of the contracts are before the court, they appear to be not only unobjectionable but eminently fair. The one that provides for a division of earnings, according to the distance which each corporation shall have carried the person or thing for which the money is paid, certainly presents as just a method of division as can be devised. It gives each its own and requires neither to pay tribute to the other for the advantage of the connection.

On the case as it now stands, it is clear that the complainant is not entitled to an injunction on this branch of the case.

The complainant makes an additional claim. He says that the sale of the eight hundred shares of the stock of the Philadelphia, Marlton and Medford Railroad Company should be enjoined, because the directors intend, as he says he is informed and believes, to sell them for less than their fair value, and that their object in doing so is, first, to deprive the Camden and Atlantic Railroad Company of its proper influence in the management of the affairs of the Philadelphia, Marlton and Medford Railroad Company, and second, to depreciate the property of the Camden and Atlantic Railroad Company. The defendants deny these charges, and show that the stock was obtained, not by subscription, but in exchange for iron rails which the Camden and Atlantic Railroad Company had ceased to use, and the directors say, believing that the interests of the corporation would be best promoted by a sale of the stock, they directed their president to sell it, at such price as should be shown to be its market value, by a public sale of a part of it. The fraud charged against the defendants on this part of the case is denied.

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in such manner as to deprive the complainant of all right to interference by the court.

The injunction asked must be denied, and the order to show cause discharged.

I am quite decidedly of opinion, if a contrary conclusion had been reached on the main case, it would still have been the duty of the court to have refused the injunction asked. The Philadelphia, Marlton and Medford Railroad Company and the New Jersey Southern Railroad Company are not parties to this suit. They are unquestionably necessary parties. The contract with the New Jersey Southern Railroad Company must have been completed and concluded, as both the bill and answer agree that it was in course of preparation for the signatures of the parties. It is impossible for me to see how it could have been in course of preparation, unless the terms of it had been settled and agreed upon by the contracting parties. If it was completed up to the point of execution, it is easy to see that equities might exist in favor of the omitted party, which would entitle such party to the formal execution of the contract, even against the complainant, though, on the case as it stands between the complainant and the defendants, the complainant might be entitled to the aid he asks. The indispensable qualities of every valid judicial sentence are, that the court pronouncing the sentence shall have jurisdiction of the parties and of the subject-matter adjudged, and that the sentence shall, in substance and effect, be within the issue made by the pleadings. It is an obvious dictate of reason and justice that a court shall not determine the rights of a party not before it, and who has had no opportunity to be heard in defence of them. The granting of an injunction in this case might, at least temporarily, deprive the omitted party of highly valuable and important rights.

The rule upon this subject is settled. Chief-Justice Beasley, in pronouncing the judgment of the court of errors and appeals in *Morgan v. Rose*, 7 C. E. Gr. 592, said: "The non-joinder of an essential party does not necessarily lead to the dissolution of an injunction; the general rule is that it will have that effect, but such rule is not universal. * * * I think the true prin-

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ciple is, that when the injunction will have the effect of injuring, in any material respect, the rights of absent persons, the court will not, unless in case of special necessity, interfere with such rights, but that when the absence of persons as parties constitutes, so far as the granting or refusing of the injunction is concerned, a formal rather than a substantial defect, there is no ground, arising from such fact, for a refusal of the temporary aid of the court, if such aid appears, under the circumstances, to be equitable."

The application of this rule to the case in hand is apparent.

CORNELIUS H. JACOBUS

v.

HARRIET E. JACOBUS et al.

Where, on a bill filed for the partition of lands, they are sold under the statute, and a defendant, without filing plea or answer, accepts of all she is entitled to, excepting her share of the portion invested for a brother during his lifetime, under the will of their father, all her interest is thereby converted into personalty.

On petition by Ida P. Cox and Theodore D. Hedden to open a decree of distribution made in the above cause.

Mr. C. G. Garrison, for petitioners.

Messrs. C. & R. Wayne Parker, for respondents.

BIRD, V. C.

Catharine Hedden, the mother of the petitioners, and her brothers and sisters, six in all, took title to lands in Essex, in equal parts, subject to the support for life of John I. Jacobus, a feeble-minded brother, under the will of their father, Hassel C.

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Jacobus. One of them filed a bill for partition in 1873. A decree *pro confesso* was taken against all of the defendants, of whom Mrs. Hedden was one. In due course, under the statute, a sale was made, the proceeds amounting to over \$11,000, of which \$6,000 were invested on bond and mortgage for the support of the feeble-minded brother during his life. The balance was distributed amongst those who were entitled to the land at the time of the sale. *Mrs. Hedden accepted her share of this balance.*

In March, 1881, John I. Jacobus died. The surviving executor of Hassel C. Jacobus obtained an order of distribution in the above-stated cause, under which he was directed to pay the said \$6,000 and interest to the persons entitled thereto, among whom Mrs. Hedden, the mother of the petitioners, was named as one. But in about twelve days, or a very short period of time after such order of distribution was made, that is, on April 12th, 1881, the executor learned for the first time that Mrs. Hedden had died about January 1st, 1879, before the said decree of distribution was made.

In August, 1881 (the order for distribution being April 1st, and the executor learning April 12th, 1881, that Mrs. Hedden had died long before), one of the petitioners, Theodore, having a power of attorney from his sister, called upon the executor and demanded their share of said \$6,000, that is, one-sixth, the amount which had been ordered to be paid to their mother. The executor declined to pay the money, insisting that he could only pay it to an administrator of Mrs. Hedden.

December 22d, 1881, Bowman S. Cox, the husband of Ida P., applied for and obtained letters of administration on the estate of Mrs. Hedden from the surrogate of Gloucester county, in which she died. This was after Theodore had called on the executor and demanded the money, and had been told by the executor that there must be an administrator. Theodore was called as a witness and said :

" Mr. Cox told me that he got an offer of what was left—the Mechanics Bank—of what they chose to pay him ; I believe he said the amount would pay seventy-

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five per cent. ; *Mr. Cox acted for us* ; I do not know whether Mr. Cox refused the offer."

Mr. Roome swears that he urged Theodore to have the estate of his mother administered upon at once, and that "*he said he would.*" He further says :

"I saw nothing more of them until after the bank failed ; *some time after that Bowman S. Cox, the son-in-law of Catharine Hedden, called and said he was administrator of Mrs. Hedden, and demanded the share of money due her estate* ; I told him I had deposited the money in bank, which had failed, and at present I could not pay it ; he said he supposed I held myself responsible for the whole amount and interest ; I told him I held myself responsible for what the bank paid and nothing more ; *he handed me the letters of administration which I produce here* ; I received a letter afterwards from Mr. Cox, demanding the money, or he would bring suit for the same ; I produce the letter."

This letter is dated March 20th, 1882, and is as follows :

"*Mr. Roome—Dear sir—I have been waiting very patiently for you to send me the money due me as administrator of Catharine Hedden, deceased. If the money, with the interest due up to this date, is not paid by the 1st of March, 1882, I will commence suit for the recovery of the same. Mr. Hedden is very clamorous for his money, and the matter had as well be settled first as last.*

"Yours &c.,

B. S. Cox, *adm'r.*"

Earlier than this, February 20th, 1882, Mr. Cox, as administrator, wrote a letter to Mr. Baker who was counsel for Roome, making a similar demand and threatening suit.

The petitioners now insist that they are entitled to this money as heirs-at-law of Mrs. Hedden, and not as next of kin.

I think that Mrs. Hedden had a vested interest in the entire proceeds of the sale, and that when she accepted her share of the excess of \$6,000, it was such a recognition of the conversion of the land into money as to bring it within the case of *Smith v. Bayright*, 7 Stew. Eq. 424.

But if this should fail as a matter of principle, still the conduct of the petitioners compels me to apply the same case. For after Theodore P. Hedden had gone with power of attorney from his sister and demanded this money of Mr. Roome, and

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had been told he must have an administrator appointed, and had left promising he would; one was appointed. That administrator was his sister's husband. From the circumstances of the case the court cannot escape the conviction that he was made administrator by the request and procurement of the heirs-at-law, and for the purpose of collecting the money in the hands of Mr. Roome. Mr. Cox, as such administrator, writes to Mr. Roome demanding this money, and threatens to bring suit if it be not paid. From the facts before me, the petitioners elected to treat this money as personalty, and having done so, they can only take it as next of kin. They must therefore obtain it through the regular course of distribution at the hands of the administrator.

If I am right in this conclusion, the petitioners have no standing in court, and their petition should be dismissed. I will advise a decree accordingly.

The administrator is the proper person to come into this court to ask for a correction of the decree, and to take steps for the collection of the money.

JOHN J. VAN LIEW AND JOHN G. SCHOMP, administrators
of Dennis L. Van Liew, deceased,

v.

THOMAS GALTRA, AND JAMES J. BERGEN, administrator of
Catharine E. Van Liew, deceased.

Where the wife, surviving the husband, or her representative, after his death, claims money remaining in the homestead on the death of the husband, it is not enough to show that she once earned money, nor that she received a portion from her father's estate, nor that her husband at times gave her money, without further identifying such sums and showing that the moneys in question are the same, or that the moneys so earned or received by the

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wife passed to the husband without a lawful consideration. It must appear that at the time of his death he was her debtor.

Mr. John Schomp, for complainants.

Messrs. Gaston & Bergen and *R. V. Lindabury*, for defendants.

BIRD, V. C.

The bill in this case is filed by John J. Van Liew and John G. Schomp, as administrators of Dennis L. Van Liew, deceased, against Thomas Galtra, and James J. Bergen, administrator of Catharine E. Van Liew, deceased, to determine the right to \$5,441.49, which was deposited by the said John L. Van Liew in the National Iron Bank at Morristown. The following recital will show the principal facts upon which the question has arisen :

The said Dennis Van Liew and the said Catharine were husband and wife. They had been married about thirty-one years. He died on the 21st day of September, 1881, and she the next. This money and notes of hand and bonds and mortgages were found in the house where they had lived since their marriage. He had been engaged in hotel-keeping about two years prior to their marriage, and continued it until his death, she living with him during all their married life as his wife. This business was conducted in his name. She had no separate business. In 1873 she received from commissioners, who sold the real estate of which her father died seized, \$2,406, in money, notes and bonds and mortgages, of which at least \$1,571.25 were in these securities, which securities were retained by her until her death, and were unmistakably identified by the witnesses. A small amount of this money was in the till in the bar, \$36 in a small trunk, which had no lock on it, and all the rest in a larger trunk, which was locked. The \$36 had been placed in the small trunk after Mr. Van Liew's death. The trunks were in a small closet or clothes-room. The key to the large trunk was usually carried by Mrs. Van Liew, with three or four other keys belonging to locks on doors or other places in the house.

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Mr. Van Liew would at times ask her for the keys, and whenever he did so he got them, and kept them at his own pleasure. There was no other place so suitable in the house in which to keep money and valuable papers. In the trunk were a shawl of hers, a vest and pair of pantaloons of his, the deed to Mr. Van Liew for the property on which they lived, an insurance policy on his house, notes of hand belonging to him, receipts to him for payments made by him, four pocket-books, all well worn, and all this \$5,441.49 in currency, gold, silver and pennies. Her name was on the loose box in the trunk, being a part of the trunk. The initial letters of her name were on one of these old pocket-books, and it is claimed that it contained \$2,655 of the money, in currency. One pocket-book contained \$670. There was in this trunk a small bag, like a small salt-sack, which contained \$1,307.50 in gold. One small bag contained \$400 and one \$200 in silver. All the rest was spread over the pantaloons and vest in the bottom of the trunk, or was found in the till of the bar. He was taken sick first. When she was taken sick she handed all the keys to a servant girl, who laid them in a box, from whence they were taken by Mrs. Galtra, the wife of one of the defendants, after Mr. Van Liew died. After Mrs. Van Liew died, the complainant, John L. Van Liew, and the defendant, Thomas Galtra, carried this money to the bank of the defendant, and deposited it in their own names, for which they took a certificate of deposit which declared it to be payable to their order on return of the certificate. This certificate the complainant, John L. Van Liew, has endorsed, but the bank refuses to pay the money without the endorsement of Mr. Galtra, which he declines to give.

The complainants claim that they, as administrators of Dennis L. Van Liew, are entitled to all this money, and that Mr. Galtra should join in making the proper endorsement of the certificate, so that they can draw it. Mr. Galtra declines, because he thinks Mrs. Van Liew, who was his sister, was the owner of all or a portion of the fund, and that it should go to the defendant, Mr. Bergen, as her administrator. In his answer, Mr. Bergen claims the whole, but in case that should fail, then

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the sum of \$824.75, the difference between the value of the securities now on hand, which she received and which were in the trunk, and the sum of \$2,406, the whole amount which she received from her father's estate.

At the time of the death of Mr. Van Liew, whose money was this? Was it all Mrs. Van Liew's? If not, was any part? If any part, how much? If the evidence will not give it all to her, will it any part? In other words, is there any evidence upon which a decree can be based, showing that any portion of this money, less than the whole, was Mrs. Van Liew's at the time of her husband's death? Remembering the fact that Mrs. Van Liew was a married woman, these inquiries reveal the difficulties of the defendants' case.

It is claimed that Mrs. Van Liew received from her father's estate \$824.75. Supposing this to be clearly established, is there any proof showing what became of it afterwards? I fail to discover any. It is not traced or identified beyond the payment to her. The money Mr. Randolph speaks of was no part of it, for the transaction or interview which he details took place long before she received the \$824.75, and she told him that she had then had it so long that she had forgotten it. Neither the claim to the \$824.75 nor to the sum referred to by Mr. Randolph seems to me to be well established.

As to the whole fund, the claim is based on the allegation in the answer that it was in her possession. It was found in her trunk, the key to which she carried, except when her husband wanted it. In addition to this, testimony was offered, showing what had passed between Mr. and Mrs. Van Liew with respect to their possessions or interests. One circumstance, above adverted to, is described by Mr. Randolph. It was over eleven years ago. He had taken dinner with Mr. and Mrs. Van Liew at his invitation. After dinner, and when he and Mr. Van Liew were alone, Mr. Van Liew asked him if he was going to Somerville the next day, and he said he was. Then Mr. Van Liew said: "My wife has got some Somerset county money, and I want you to take it down and get it changed." The witness added:

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"Then he went in the other room and they had some talk about it; I heard them conversing together and in a few moments he appeared with the money and threw it on my lap; I forget the amount, but there was between \$200 and \$300; she came to the dining-room door and stood half-way in the door and laughed; I said 'Liz, how came you to keep this money so long?' and she said 'I forgot I had it;' then they said they wanted me to take it to Somerville and see what John Veghte could do with it."

When Mr. Van Liew threw the money in the lap of the witness, he said: "There, you see what a business woman I have got, or something like it." The witness did not take the money; but he says that afterwards Mr. Van Liew told him "that he had got dollar for dollar for it." Were it clear from this evidence that this money was hers, as in the previous case, it does not appear what became of it. If the statement is taken as a whole, as it must be, then it would appear that Mrs. Van Liew earned this money so long before that she had forgotten it, and that Mr. Van Liew had got "dollar for dollar" for the bills, leaving the possession in him; and this he would be protected in as the law then stood. I cannot understand that this branch of the defendants' case in any wise strengthens their claim to the whole fund.

Other occurrences are given by Amanda Wilson, who worked in the family the last six months of Mr. Van Liew's lifetime. About six months before his death she was present at the dinner-table and heard a conversation between Mr. and Mrs. Van Liew about some gold. At first she could not recall what either said. She afterwards said: "I remember him giving her gold," at which time she says he said: "This is yours, Lizzie; this is what I owe you." The witness did not know how much gold there was. She did not see it. It was in a small bag like a salt-sack. No receipt was given, nor was there any accounting. He did not say how much there was, nor did she inquire. There is no evidence, except this declaration, of any indebtedness. I think the observation is just, that if these persons were treating each other as debtor and creditor, and in that capacity, so much as a bag of gold, more or less, passing at one transaction, there would have been some written evidence of it, or at least an ascertain-

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ment by actual count on the delivery of what was tendered in liquidation of any debt. Miss Wilson says that while she was there she saw Mr. Van Liew hand his wife gold several times. What amount she never learned. Nor was she able to tell what Mrs. Van Liew did with it. On one occasion only is the witness able to recall anything that was said. There is no evidence from any source as to the amount of gold that passed on any of these occasions, and what was said on that one is wholly insufficient to satisfy the mind that the husband was discharging an obligation, or the others to make a gift. Besides, it is not shown that Mrs. Van Liew carried these moneys to the trunk, or deposited them elsewhere, or in the same or any other form retained them until her death. Notwithstanding the wise liberality of the courts toward married women in the preservation of their separate estates, it is believed that none have gone so far as to allow either married women or their representatives to retain personal property as against their husbands or their representatives, upon such slight proof as that offered to sustain this branch of the case is deemed to be.

But a further reason why judgment should pass for the defendants for the whole fund is offered, which is that Mrs. Van Liew had the absolute possession and control of it at the time of her husband's death, because it was in her trunk, the key of which she carried. I cannot concur in this view. It is too broad to admit of any special or general application to cases where confidential relations exist. The control allowed her was not in the ownership of the trunk or the pocket-books, but in the possession of the key. If this be enough to carry the case, then upon a like principle the contents of stores, safes and bank-vaults could be claimed by confidential clerks entrusted with the keys thereto. But whatever weight the facts stated and urged on this branch of the case may otherwise merit, it is, I submit, overcome by the uncontradicted testimony of Miss Wilson, who says that Mr. Van Liew obtained the keys whenever he wanted them, and retained them at his own will.

I think that when the wife, surviving the husband, or her representative, after her death, claims money remaining in the

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homestead on the death of the husband, it is not enough to show that she once earned money, nor that she received a portion from her father's estate, nor that her husband at times gave her money, without further identifying such sums and showing that the moneys in question are the same, or that the moneys so earned or received by the wife passed to the husband without a lawful consideration. It must appear that at the time of his death he was her debtor. The courts have not yet said that recent legislation has so transformed the marital relation as to secure to the wife more than the favors which the husband formerly enjoyed. Doubtless the same presumptions and rules of evidence are to be applied in this case as formerly. *Walker v. Reamy*, 36 Pa. St. 410; *Peavin v. Capewell*, 45 Pa. St. 89; *Buck v. Ashbrook*, 59 Mo. 200; *Bradford's Appeal*, 29 Pa. St. 513.

I think the complainants are entitled to the fund in bank, and that it is the duty of Mr. Galtra to endorse the certificate referred to, and will advise a decree accordingly.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY.

OCTOBER TERM, 1882.

THEODORE RUNYON, ESQ., ORDINARY.

J. HARVEY BARKER, executor, proponent, appellant.

v.

JACOB BARKER, caveator, respondent.

Evidence that testatrix, after she made the will in question, denied that she had made a will, and said she would not make any, but would leave her children to share equally in her property, while it is competent to show that the will is spurious, and that the testatrix had not testamentary capacity, is not competent to show undue influence.

Appeal from decree of Warren orphans court.

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Mr. L. De Witt Taylor, for appellant.

Mr. Nicholas Harris, for respondent.

THE ORDINARY.

This is an appeal from the decree of the Warren orphans court, refusing to admit to probate a paper writing, purporting to be the will of Mrs. Anna M. Barker, deceased. The instrument is dated April 2d, 1880. The testatrix died in May of the following year. When the will was made, and thenceforward to the time of her death, she was living in her own house with her son, James H., commonly called Harvey, Barker, and his little child, a lame girl, who, at the date of the will, was about ten years old. Harvey was a widower. The testatrix had several other children, one of whom was Jacob, the caveator, with whom, or with whose wife, she seems to have been at variance, and there is some evidence that she was not on good terms with others of her children. The will was drawn by Isaac M. Read, a neighbor. By it, after providing for the payment of her debts and funeral expenses, she gave to her son Harvey all her property for life, providing that if the personal property should be insufficient for his support, he might dispose of the real estate as he might think best, and that at his death the property should go to his daughter, the little girl before mentioned; and she appointed Read and Harvey executors of the will. The will is propounded by Harvey for probate. The estate seems to be small. It consists of a house and lot in Jacksonburgh, in Warren county (the lot containing about an acre), and about \$1,200 in money and household goods. Mr. Read, who drew the will, as before mentioned, testifies that it was drawn in her house at between eight and nine o'clock in the evening of the day on which it was signed; that he received from his wife information that the testatrix wanted him to go to her house, and he went there accordingly; that that was the first that he had been spoken to about drawing the testatrix's will, and that when he arrived there the testatrix told him she

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wanted him to write her will, and how she wanted it, and that he wrote it right there in her room ; that she mentioned whom she wanted to be the executors ; that when she told him how she wanted the will, he desired her to get some one else to write it, but she said she wished him to write it ; that she said that Harvey was the only one that had ever done anything for her, or taken care of her ; that when he was away she would become needy, and that she had sent to Jacob's for some flour, and that they had refused her, and would do nothing for her, and that she had got Harvey word at that time, and that he came over, or sent over some money to her ; that Harvey had helped her to get the money, and that she wanted him to have the use of it for his lifetime, and that she wanted that crippled child of his to have it. He says he does not know that she gave any reason why she did not give anything to the others ; that he spoke to her about her daughter, Susan Swisher, and said that she had been there to the house a good deal, and had been kind to her, to which the testatrix assented, adding that she had paid her for it, or something to that effect. Mr. Read says he has known her about twenty years, and, as before stated, he was a neighbor. The other witness was also a neighbor, Mr. Elias E. Beegle. Mr. Read says that the testatrix was in her own house when she signed the will ; that he saw her make her mark in her name there, and that Beegle was present at the same time ; that he, Read, read the paper to her before she signed it, and that she acknowledged that it was her last will and testament before she executed it, in the presence of himself and Beegle ; that she requested Beegle to witness it, and that he, Read, signed his name there in the presence of the testatrix and of Mr. Beegle, the other witness, and that Mr. Beegle signed his name in his presence and that of the testatrix. He further says that, in his judgment, she was, at the time she executed the will, of sound and disposing mind and memory.

He further says that in making her mark she held the pen in her own hand, but he does not remember which hand it was ; that it was a steel pen, and that she held it without any assistance ; that though she had been paralyzed on one side of her

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body (he does not know on which side), she had the use of one hand. He further says he thinks she suggested the name of Mr. Beegle as a witness; that he mentioned Mr. McConachy as a witness, but she did not want him; that he then mentioned Elias J. Snover, but she said she did not care to have Mr. Snover, and then she said, "Send for Elias Beegle," and spoke about Beegle having done some writing for her; and that he then sent Harvey to tell Beegle to come. He testifies that no one else was present, and that Harvey was not in the room while he was there. He also says that the testatrix suggested his name as executor; that he asked her whom she would have for executor, and she answered that she had thought of him and Harvey, and that she wanted them to be the executors. It appears from his testimony that when he first went to her house on that evening he went to see what she wanted of him, and that when she told him what she wanted he went to his own house, which was only a few hundred yards away, and got paper, pen and ink to draw the will, and returned to her house, and then drew the will. He swears that she told him just how she wanted the will, and that he wrote it just as she wanted it; that she told him how she wanted her property distributed; that she spoke about the crippled grandchild, Harvey's daughter, and that he said, "Mrs. Barker, don't you want to leave anything to the rest?" and that she answered "No," and gave her reasons why she wanted it so, mentioning her son Jacob's name. He further says she spoke about several of her children, not the one living at Newton (William), and spoke about her daughter Jane going away mad, angry. He also says she did not mention her daughter Fanny or her grandchild in Illinois. Her children appear to have been Jacob, William (living in Newton), Fanny, Jane Danly, James Harvey, Susan Swisher, Mary Ann Drake, and a deceased daughter, who left three children. He further says that after he wrote the will he read it over to her slowly, and then asked her if that was the way she wanted it, and that she said it was. It also appears from his testimony that she had been paralyzed for a long time, and that he had been in her house to see her probably four or five times after she was stricken with paralysis. He

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says the visits were three or four days, or three or four weeks apart, and that he had not seen her in three or four weeks when he drew the will. He also says that he never talked with Harvey about writing the will, nor did Harvey talk to him on the subject. He swears positively that she made the cross for her signature. Mr. Beegle, the other witness, lived within a hundred and fifty yards of the testatrix. He swears that he signed his name as a witness to the will at the testatrix's request, and saw her make her mark on the will; that Read was present at the same time; that before she made her mark she acknowledged it as her last will and testament, and that Read signed his name there at the same time in his presence and that of the testatrix; and that he, the witness, signed his name also as a witness to her execution of the will at the same time. On cross-examination he says that Harvey came to his house about nine o'clock that evening and told him that his mother wanted to see him. He further says that the will was executed twenty or thirty minutes after he went into the house; that the body of the will was written when he got there, but the attestation clause after he arrived there, and before she signed it; that he thinks she held the pen alone; and he further says that to the best of his knowledge she was of sound mind at the time she executed the will. He adds that he witnessed a paper for her in regard to drawing her pension-money afterwards, and that she seemed to know what she was about. It has already been remarked that she lived more than a year after the date of the will in question.

The caveator opposes the will on the ground of incompetency and fraud. He insists that at the time when it purports to have been executed, and when Beegle and Read both swear it was executed by the testatrix, she was in bed suffering from a severe stroke of paralysis, and unable by reason of that disease to make a testamentary disposition of her property. It follows, necessarily, if such was her condition at that time, that Read and Beegle and Harvey have not only testified falsely, but that they were guilty of a conspiracy to dispose of the estate of the testatrix by a spurious will. The caveator produces Dr. Johnson, the physician who attended the testatrix in her sickness. He

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testifies that he had been her family physician for twenty-five years; that he remembers her having a stroke of paralysis the last of March, 1880; that he was called to see her on the last day of March, which was Wednesday; that she had threatening symptoms; that she was sitting on a chair, and her son Harvey was with her; that on Friday, two days afterwards, he was again called to see her and found her in bed, with a decided and entire paralysis of her right side; that her mental condition was a sort of stupor, and he gives it as his opinion that she was not then able to hold a pen in her right hand, and that at the time of the day when he saw her, which was about noon, it was necessary to arouse her to get her to attend to any business, and that if she attended to any important business on that day, it would have been necessary that it should have been previously mapped out in her mind. It appears from his testimony that the stupor of which he speaks continued for a whole week, but after that he says her mental condition was very fair. He adds that she was naturally a reticent woman, and would not carry on much of a conversation at any time; that her ordinary manner was merely to answer such questions as were put to her. Rebecca Swisher, the mother-in-law of the testatrix's daughter Susan, and Susan both testify that they were at the testatrix's house on the 1st day of April, the day preceding that on which the will was executed; that they were there in the afternoon of that day, and that the testatrix was unable to carry on any conversation with them, and that Susan tried to talk with her but she did not make any reply. Susan says she was there again on the 3d of April (Saturday), and that her husband and child went with her, and that on that day the testatrix was very sleepy, and knew nothing; that she, the witness, stayed until Sunday afternoon. She further says that Elias Snover was there on Saturday night. Mrs. Elsie A. Snover and her husband, Elias Snover, just referred to, both testify to having been at the testatrix's house at the time of this sickness. Mrs. Snover says that she was there about the 1st of April; that she was there, as far as she can fix the days, on the 3d and 4th; that she remembers those two days particularly, and thinks she was there before.

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She says she had been in there, but does not remember the days, and does not remember the day when the testatrix was taken sick; that Dr. Johnson was attending her while the witness was there; that it was some time in the afternoon that she went there, on the 3d of April; that she saw the testatrix, who was lying in bed, and that she lay in a very stupefied condition. It will be observed that this witness does not speak positively as to any day, but says as nearly as she can fix the days, she was there on the 3d and 4th of the month. Her husband says he thinks he was there on the 1st, but is not positive. He testifies that he was there on the 2d, 3d and 4th; that he thinks he was there in the forenoon of the 2d, and was there just at night; and he testifies to the condition of the testatrix. He says she was in a very feeble condition, drowsy, and he did not think she noticed what was going on while he was there; that she did not appear to notice what was going on; that he first spoke to her referring to her bad condition, and he could hardly understand what she said; that she roused up and said something, but he could hardly understand what it was; that she could hardly speak, and did not offer to converse with him, but he said nothing more to her; and that this was before supper, and after supper he went back again, but said nothing more to her. He swears it was between eight and nine o'clock at night when he went away the last time, and that Harvey was there when he went away; that he does not remember that any one else was there, and that there did not appear to be any difference in her condition after supper when he went back. It will be remembered that Read swears that the will was written in the testatrix's house between eight and nine o'clock in the evening, and that Beegle swears that it was about nine o'clock at night when Harvey came to his house and told him that his mother wanted to see him. And he further testifies that the will was executed in twenty or thirty minutes after he went into the house, which was only about one hundred and fifty yards from where he lived. The 3d of April was Saturday. Mrs. Snover says on that day, while she was there, the testatrix expressed a great desire to see her son William. This fact is of some importance in

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fixing the time. It appears too clearly to admit of any doubt whatever that both Susan and her mother-in-law are entirely mistaken in regard to the testatrix's condition on the 1st of April; that, so far from being in the condition in which they testify she was on that day, she was up and about the house, engaged in household duties, and entirely competent to transact business.

George F. Snover and his son Lemuel called at her house about sunset of that day. The business of the former was to pay her some interest which he owed upon a note of his which she held. He testifies that Harvey was there with her, and no one else; that when he went in she and Harvey sat by the table, eating; that Harvey rose and gave him a chair, and he asked how she did, and she replied that she had been about as she had been, only that she had no use of one arm much. He says he waited while she was eating, and told her he had come to pay the interest on the note; that she then told Harvey to go and get the note, and he asked where it was, and she told him somewhere in the trunk, and he got the note and brought it to her; that the interest was \$42, and he counted out that sum all in gold, except \$2 in silver, and that she remarked that that was more gold than she had ever seen in her life; and he then and there endorsed the interest on the note, and she took up the money after he had made the endorsement. He further says that he talked to her about general topics, and told her if she wanted any more of the money he would pay her some of the principal, and she asked Harvey if he thought they could get along without any more than the interest which he, Snover, had paid, and Harvey said he guessed they did not want any more; and then she said if the rest would only come and pay their interest as the witness did they could get along. He says that she mentioned the fact that Elias Snover owed her some money, and said she did not think they would ever get anything from him. He adds that from what he saw and heard that day she answered him correctly, and seemed as sensible as she well could be, though her voice was a little lower in tone than it had been,

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and although he was a little hard of hearing, he could hear everything she said.

He further says that at that visit she was baking cakes on the stove, and reached and got the cakes with her left hand, without getting up, but that she had no use of her right hand, and had it lying on the table. His son Lemuel testifies to the same thing substantially. The note, with its endorsement, is produced, and, as before remarked, it appears too clearly to be doubted that the Swishers are entirely mistaken in their testimony as to the visit of the 1st of April, and the condition of the testatrix on that day. It is also very probable that the doctor, Elias Snover and his wife are all mistaken as to the time when the sickness of which they speak occurred. Harvey says that it was not on Friday, the 2d, but Friday, the 9th, that his mother was taken down to her bed. Susan says that she stayed all night on Saturday night, the 3d of April. Harvey says that it was the 10th, and not the 3d. She says that Elias Snover was there then, and the latter says that testatrix's son William was there on Sunday. Now Harvey swears that it was on the 9th of April, Saturday morning, that he sent word to his brother William, at Newton, that his mother was sick. He also swears that his brother William sat up with his mother on the following Sunday night. It is to be observed that neither Dr. Johnson nor any other of the witnesses on the part of the caveator appear to have any means of fixing the time of their visits to the testatrix, except from mere unassisted recollection, and they testified in November, 1881, about a year and a half after the occurrences. The doctor makes no reference to any charge or other memorandum in his books, nor to any incident enabling him to speak with positiveness as to the time when he made the visit, which he says he thinks was on the 2d of April. Nor does he, indeed, undertake to speak positively as to the time. His language is, "My impression is that it was on Friday, April 2d." And it is obvious, from the character of his testimony on the subject, that while he speaks according to his best recollection, he speaks only from unaided memory, without confirmation of any kind, except such as is to be derived from the testi-

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mony of the other witnesses. They, too, in like manner, speak only from recollection, and, like him, give their impressions as to the time.

It is certain, as before stated, that the Swishers are entirely mistaken as to their alleged visit on the 1st of April, and this fact detracts greatly from the value of their testimony as to the time. A careful examination and consideration of the testimony leads me to the conclusion that these witnesses on the part of the caveator are mistaken as to the time of their visits, and that those visits took place one week later than the time which they have fixed. And here it may be remarked that the witness Elias Snover appears to be at enmity with Harvey. The latter testified, apparently without objection being made to the testimony, that in June, 1881, just before he was coming down to prove the will, Snover approached him when he was alone, and referring to the fact that they were without witnesses to their conversation, proposed to him that if he would give up to him, Snover, his note of \$150 held by the testatrix, he, Snover, would be with him in the controversy; and added that otherwise he was going in with Jacob, who had promised that if he got the estate into his hands he would receipt the note and give it up to him; that he, Harvey, told Snover he was afraid to do any such business, and he adds that they had no further conversation, and that he had not spoken to Snover from that time to the time when Harvey gave his testimony. No effort was made to contradict this statement in any respect.

There is evidence in the testimony of Susan Swisher, and of Elias Snover, that the testatrix denied, after she had recovered from the severity of her sickness, that she had made any will at all, and that she said that she would make none, but would leave her children to share equally in her property. This evidence is competent to show that the will is spurious and had never been executed by the testatrix, and is competent to show want of testamentary capacity when the will was executed, but is not competent to show undue influence on the part of Harvey. Of itself, however, it is obviously not conclusive on either of the former heads, and there is no attempt to prove undue influence in

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the case. The weight of the evidence is clearly in favor of the validity of the will. The decree will be reversed, and the paper admitted to probate. The costs of both sides, both in the court below and here, and a counsel fee of \$100 to each side, will be paid out of the estate.

THOMAS NELSON DALE, appellant,

v.

FREDERICK S. DALE, respondent.

1. Though fraud in procuring a will may be inferred, the inference cannot lawfully be drawn unless it is natural and necessary. And the court will refuse to impute fraud when the evidence does not necessitate a belief in its existence.

2. In this case a mother gave all her property, with comparatively small exceptions, to one of her two sons. It appeared that she was of sound mind, and that when she made the will she harbored resentment against the other son, arising out of a business transaction between him and her. The son to whom she gave almost all her estate was on confidential terms with her, and acted as her amanuensis in giving instructions for the will, and aided her in obtaining the will from her lawyer, after it was drawn, to be executed. There was no evidence of threats, restraint or coercion of any kind, nor even of importunity or persuasion, to induce her to make the will.—*Held*, that there was in the case no evidence of testamentary incapacity, nor any evidence of undue influence, and (reversing the decree of the orphans court) that the will must be admitted to probate.

On appeal from decree of Passaic orphans court refusing to admit to probate a paper writing, purporting to be the will of Sarah P. Dale, deceased.

Mr. H. Wallis and Mr. John Linn, for appellant.

Mr. J. S. Barkalow and Mr. J. D. Bedle, for respondent.

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THE ORDINARY.

Sarah P. Dale, widow of Thomas N. Dale, deceased, died on the 8th of May, 1880, in Philadelphia, at the house of her friend, Rev. David Winters, whose family she was then visiting, and whose wife was an old acquaintance and intimate friend of hers. She had been at his house for over five weeks—from about the 26th or 27th of March preceding. On the 28th of April, ten days before her death, she executed her will, which had been some time previously drawn for her by her lawyer, Mr. Hamilton Wallis, and which was sent to her at Philadelphia. By the will, after ordering that her debts and funeral and testamentary expenses be paid, she gave to her son, Thomas Nelson Dale, as his absolute property, all her personal property, including paintings, books, furniture, bronzes, porcelain and glassware, diamonds, jewelry, silver and silver-plated ware in her possession, or to which she might be entitled at the time of her death, except such as was in the will specifically bequeathed, and also certain real estate in New Haven, and her house and lot at Newport, with the furniture therein. She then gave to his daughter, Sarah Nelson Dale, the contents of two barrels (of crockery) belonging to her, the testatrix, and in Paterson, to be delivered to her by the executors whenever her parents, or the survivor of them, shall certify, in writing, that she is of sufficient discretion to receive them, and provided that if both of the legatee's parents should die without making any such certificate, the contents of the barrels are to be delivered to the legatee on the death of the survivor of her parents. She then gave to her son, Thomas Nelson Dale, all her property, real and personal, that might come to her as heir-at-law or devisee of her father, then deceased, and which might come to her by devise or descent from her mother, and also all her interest in a bill of sale and chattel mortgage, given to her by her son, Frederick S. Dale, of certain machinery in Paterson, and all moneys that might become due or payable to her or her estate therefrom or thereunder, in trust, first, to apply the rents, profits and income to the payment of all taxes, insurance premiums, interest or repairs that might become chargeable against the property, or any

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part of it, or that might be necessary for its preservation; second, to pay to the two daughters of her son Frederick \$1,000 each, in such installments and at such times as the trustee, with the advice of her other executor (David L. Daggett, of New Haven) might think proper, the legacies to bear interest from the period of one year from her decease; to receive the rents and income from the property to come to the testatrix as heir or devisee of her father, and apply them to his own use until his youngest child living at her death, or that might be born within the ordinary time of gestation thereafter, should have reached the age of twenty-one years, and thereupon to divide that property equally among those children and the legal representatives of such of them as should have died, *per stirpes* and not *per capita*; to divide what property she might be entitled to as heir-at-law, next of kin or devisee of her mother, into two equal parts, and retain one for himself absolutely, and invest the other half as he should see fit and pay the net income to his wife, for life, and the principal, at her death, to their daughter Sarah, or her legal representatives; and she gave the residue of her estate to him and appointed him and Mr. Daggett, before mentioned, the executors, giving them power to sell her real estate.

The admission of the will to probate is resisted by the testatrix's son Frederick, and his opposition to it is based on the allegation that she was, when the will was made, not possessed of testamentary capacity, and that the will was the result of undue influence by his brother, Thomas Nelson, upon her. The testatrix had but the two children. Her husband died in the summer of 1879. Her estate amounts, according to the caveator's estimate, to about \$44,000. When she died she had long been suffering from a disease which in her case proved incurable, and which at last caused her death. In the summer of 1879 she was in Europe, at Teplitz, in Bohemia, whither she had gone some time previously, and where she had stayed alone. Her husband, when she went to Europe, remained in Paterson, and her two children also remained in this country. In the summer of 1879 her son Frederick went to Teplitz to see her, with a view, as it appears, of purchasing from her certain machinery

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for the manufacture of silk owned by her and being in Paterson, and which he was desirous of purchasing, but for which he had failed to make a bargain with his father (who acted as his wife's agent in the matter), they being unable to agree upon the price. She and Frederick returned together. After they had returned to Paterson she sold the machinery to Frederick (her husband died in June, 1879) for \$20,000. After the negotiations were completed and the sale made, a misunderstanding arose between them, which was adjusted by her agreeing to accept the sum of \$200, which he offered to give instead of a much larger sum which she claimed he owed her (he denied the justice of the claim, however), on account of interest or the use of the machinery, in the transaction. From that time she appears to have entertained feelings of resentment and hostility towards him on that account, and repeatedly refused to see him when he called at the house (Thomas's) where she was. Dr. Blondell, who was called by the caveators, and who was her physician while she was in Paterson, says that when the sale of the machinery was brought about, all her feelings towards Frederick seemed to be changed, and instead of affection, her feeling seemed to be one of hate. It appears from his testimony that he learned from her that there was a misunderstanding (it appears to have occurred as far back as the fall of 1879) between them arising out of that sale. Mr. Wallis, the testatrix's lawyer, who advised her in the matter of the sale, so far as she needed legal advice, and who prepared the papers which were executed in the transaction, testifies that she expressed herself (this was, he says, in the first part of November, 1879) as being very much dissatisfied with Frederick's refusal to pay what she demanded; that he, Mr. Wallis, told her he would not advise her to enter into any contest in relation to the matter; that a contest would only result in tying up the machinery so that it would produce her no income, and that all contests were uncertain as to their results, and that under the circumstances he would advise her to accept her son's proposition, which was in the nature of a compromise, to allow her two or three hundred dollars for the use of the machinery; that she said that if she must, she supposed she must, but that Frederick

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would have cause to regret compelling her to accept any such proposition, or something to that effect. To Anna Inglis she said that she had made over her property to her son Nelson (Thomas); that Frederick must remember that what he took from her now he could not have when she was gone, and that she had given \$2,000 to his children to prevent the breaking of the will. The witness just mentioned further says that the testatrix, at the time she told her of the will, said that Frederick had done her two or three ugly tricks, but she never believed he would have done this, and that it was on account of the difficulty which arose out of the sale of the machinery that she refused to see him. To Elizabeth Provan she complained of Frederick's treatment of her in the matter of the machinery, and said she could not trust him. In this connection, it may be remarked that one of the caveator's witnesses testifies that in August, 1879, after the testatrix returned from Europe, she said to him that she loved Frederick as much as she did Thomas; that she was glad the former was getting along as well as he was, and she praised him for what he had done for her when he was in Europe. This conversation, it must be remembered, took place before the difficulty in regard to the machinery occurred, and it is apparent that when, subsequently to that conversation, she changed her opinion of Frederick, it was because of what seemed to her to be an adequate reason. Of the adequacy of it, however, we cannot judge (and it is not important to do so) without a better knowledge of Frederick's dealings with her and the rest of the family than the evidence discloses. It does appear that Mr. Dale, the father, was unfriendly to Frederick up to his death; so much so that when the latter was about to go to Europe, in 1879, he went to the house where his father was then living, to take leave of him, and, though his father bade him good-bye, it was after turning his back to him, and he refused to shake hands with him. It appears that there was enmity between Frederick and Thomas. It is quite probable that the testatrix's dissatisfaction with Frederick was heightened and intensified by the fact that she considered that he had got a great bargain in buying the machinery from her at

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\$20,000, notwithstanding she was willing to sell it at that price, previously to the sale to him, and to let it go for about \$19,000, the amount of her claim, at the sale at which she acquired her title to it, which was a sale under an execution in her favor for about that sum. After the sale of the machinery had been completed, which was February 16th, 1880, she made her will, and she appears to have set about making it soon after that date, although it was not signed until April following. She gave directions for it herself. She first went to Mr. Wallis's office on that business in February, and she then had a conversation with him on the subject. At his suggestion then made to her, she sent to him, at his office in the city of New York, a written memorandum dictated by her to her son Thomas, at his house in Paterson, and by him written down, and probably taken by him to Mr. Wallis's office. She subsequently visited Mr. Wallis again at his office on the subject, and he then went over the memorandum with her, making some alterations in it. On that occasion she and he conversed together on the business for about an hour. From the memorandum thus altered, and other papers which she furnished him, Mr. Wallis made a draft of the will, which he sent to her at Paterson, and received it back again after it had been altered a little, and a blank, which had been left for the name of one of the executors, filled with the name of Mr. Daggett. From the draft the will was engrossed. Mr. Wallis testifies as follows :

"Some time—it must have been in the month of February, 1880—Mrs. Dale called upon me in relation to her will; she wanted me to draw her will for her, and I told her if she would put her ideas in shape—in rough shape on paper—so that I could understand it, I would prepare the will and send it to her; I think it was on that occasion that she asked me if it was necessary to state in her will the names of all her children, and I told her that there was an antiquated notion that that was necessary, but that in fact it was not necessary; I then received this paper, which I produce; whether it was sent to me by mail or not I am not certain, but I incline to think that it was not; I have no recollection on the subject, but from the manner in which the paper has been folded, I am satisfied that it was brought to me and not sent by mail; Mrs. Dale called upon me afterwards; when I arrived at my office in the morning I found her in my private room, alone; my best recollection is that

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at that time she produced this paper; that is, the same one; it may have been I had received it before; at all events, this paper was there present; I went over the paper with Mrs. Dale, and made certain changes in pencil, or annotations in pencil, which are on the paper now; we had a conversation there about an hour, and after the conversation was over I escorted her to the outer door, and met her son Nelson in the outer office; from this paper, and certain others, I prepared the draft of the will.

"The question arose during that conversation whether the property in New Haven, which passed under her father's will, and which she seemed to consider as hers, whether she really had a title to it, was tied up by the trust, so that the title would pass by operation of law to her heirs if she died before her mother; I requested her to obtain for me a copy of her father's will before I proceeded to draw her will, and she sent me one, which I have here, also copy of certain partition proceedings in New Haven, Connecticut, which I here produce from these documents, which I will now offer in evidence separately; from those papers or from the information contained in those papers I prepared a draft of the will; that was some time in the month of March—either the latter part of February or the early part of March, 1880; which draft I have in my hand; I prepared a pencil draft, and this is a copy made by a copyist in my office from that pencil draft; this I sent to Mrs. Dale, in Paterson, and received it back by mail, I think with two alterations or with three alterations—the one on the first page, the one on the third page and the insertion of the name of an executor, which had been left blank, on the last page; no, I find one other on the next to the last page. About the same time that I received that paper I received directions to send the will engrossed to Mrs. Dale, in Philadelphia, giving the street and number where she was to be addressed; about that time I moved my office from 120 Broadway, Equitable Building, to 48 Wall street, where I am now; we actually commenced to move, I am very positive, on the 24th of March, or about that time; it was just a week before the 1st of April, 1880; the will was engrossed, but the engrossed copy, which is the paper in evidence already—the paper put in evidence the first day—the will offered for probate—was packed away with other documents in the office for removal; I received a letter from Nelson Dale, which I cannot find, stating that his mother was anxious for her will, and wanting me to send it to her; I found the engrossed copy, but could not find the address of Mrs. Dale, in Philadelphia; I knew the address of her son in Newport, and I therefore sent the will to him for him to forward it to his mother; the next time I saw it was when it was produced by Frederick S. Dale and Nelson Dale, after their mother's death. In all these interviews I had with Mrs. Dale—and there were several of them—I failed to notice any sign of mental weakness or mental disturbance; she certainly appreciated fully her rights in regard to that machinery, and understood and told me what she wanted done with it; she also stated to me, generally, the other property she possessed; she also knew the names of her children, who they were, and impressed me as being a woman of very excellent and sound sense; I had no idea that anything was the matter with her, and did not until after her death; I think she stated to me, two or three times that she did not expect to live long; I never transacted

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any business for Nelson Dale until I propounded this will for probate; never knew him until he was brought into my office by Mrs. Dale herself, so far as I can recollect."

That the testatrix was possessed of testamentary capacity, both at the time of the preparation of the will and at the time of executing it, there seems to be no reason to doubt. Her conversations with Mr. Wallis, Miss Inglis and Mrs. Provan clearly show that she had full capacity when the will was prepared. Reference has already been made to the conversations with Mr. Wallis and Miss Inglis. About three weeks before she went to Philadelphia, that is, in the early part of March, she had a conversation with Mrs. Provan on the subject of the will, in which she told Mrs. Provan what disposition she was going to make thereby. Mrs. Provan asked her whether she thought that that disposition of her property was a just one, and she replied that she supposed she would receive condemnation from some persons on account of it, but that Frederick was a smart business man and had an opportunity of making a living, which Thomas had not, and that what she was doing was for the best—providing for those who could not provide for themselves. The testimony of the subscribing witnesses shows that she was competent when the will was signed. Those witnesses were Rev. Mr. Winters, Mr. William J. Kelly, a bookseller of Philadelphia, and Dr. William B. Atkinson, of that city. He was her physician there. They all regarded her as entirely competent, and they all had opportunity to judge of her testamentary capacity. Mr. Winters had known her for a long time. At her request he invited Mr. Kelly and Dr. Atkinson to come to his house on that day for the purpose, as they were told when they were invited, of witnessing her will. He invited them to dinner and they came accordingly. After dinner the will was produced in the front parlor and was signed there. Dr. Atkinson says he and the testatrix were talking about everything, chatting for a long while about the current topics of the day, and even joked about the contesting of wills. The medical testimony adduced to show that her condition from the effects of disease must have been such as to incapacitate her for the disposition of her prop-

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erty by will, is met by counter-testimony of the same kind and of at least equal weight. And here it may be remarked that her business capacity was not doubted or questioned by the caveator down to February 16th, 1880, at least, for he then closed with her the transaction of the sale of the machinery by which he bought from her property at the price of \$20,000. Indeed, her competency to do business does not appear to have been questioned by anybody at any time. The proof of her actual mental condition at the time of the act under scrutiny, the making of the will, is, to say the least of it, far more satisfactory and convincing than the conjectural opinions of the experts. And this is especially so seeing that one of the testamentary witnesses was himself an expert, her physician, and (as were the others also) wholly without interest of any kind in the disposition of her estate. "The point of time," said Vroom, ordinary, in *Sloan v. Maxwell*, 2 Gr. Ch. 563, 573, "at which the testator's competency is to be tested, is that of the execution of the will; his antecedent or subsequent condition is chiefly important as it may bear on that epoch. And we naturally resort, in the first place, to the subscribing witnesses, because they have seen him at the decisive period, and because the law expects from them peculiar care, caution and circumspection, presuming from the fact of the attestation that they believed him competent, as otherwise they ought not to have given countenance to a deceptive instrument." Much stress is laid, on the part of the caveator, on the fact that the testatrix, while she was in Paterson in March, 1880, lay for about two days in a comatose condition, the effect of her disease, from which it is argued, that taking into account the nature of her complaint and the stage of it in which she then was, it follows, legitimately and necessarily, that she was incompetent when she executed the will. But the attack was but transient, though of long duration. She recovered from it and went, in the latter part of the month, to Philadelphia, where she remained till her death. Dr. Atkinson says she told him of that sickness, and that she had been for quite a considerable time unconscious. He was asked:

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"Did she, on that occasion [an occasion on which he was called to visit her professionally], tell you that she had, before coming to Philadelphia at that time, been for several hours, and on one occasion as long as eighteen hours, unconscious from the effect of it?"

And he answered :

"She told me something to that effect ; I can't say eighteen hours, but it was quite a considerable time she was unconscious."

So that she not only knew of the sickness but was fully aware of its character. Much reliance is placed by the caveator on the testimony of Elizabeth O'Conner (who was a servant in Thomas's family), as showing mental disturbance and serious aberration in the testatrix. But the testimony is entitled to but very little, if any, weight, and it may be said, as to all the testimony now under consideration, that the mental incapacity, the existence of which it is produced to establish, was but temporary and did not exist when the will was made. It is worthy of remark that the coma occurred in March, while the instructions for the will were given in February, and the will was executed on the 28th of April. The letters of the testatrix, written while she was in Philadelphia, are by no means evidence of the want of testamentary capacity, but the contrary. Her whole conduct in reference to the will while she was at Mr. Winters's house, not only shows competency, but freedom from constraint of any kind. In January, 1876, she made a will in which she made gifts of valuable goods, jewels and ornaments to Mrs. Winters, besides two legacies amounting to \$5,000. That will she delivered to Mr. Winters for safe keeping. At her request, he sent her a copy of it while she was in Europe. The will now under litigation gives nothing to Mrs. Winters or her family, though testatrix gave her some articles of household furniture during her last visit. Notwithstanding the change in her will, so far as Mrs. Winters was concerned, she did not, though she was a guest at her house, conceal the fact that she had made the new will or what its contents were. Mr. Winters testifies that soon after (he thinks it was the next day) she came to his house on her last

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visit, she told him she had made her will and expected soon to sign it. He also says that at her request he read the will over to her two weeks before it was executed, and that he read it to her several times. After it was executed it went into her possession. Neither of her sons was in Philadelphia during that visit before the will was signed. Thomas, who came first, arrived there only about five days before she died. After she reached Philadelphia she seems, as appears by the correspondence put in by the caveator, to have been anxious to get the will, that she might execute it, and after she got it she wanted to be sure that it was as she intended it to be.

It is urged that the conduct of Thomas in connection with the making of the will is evidence of fraud on his part. It appears that he acted as his mother's amanuensis in making the memorandum for the will, and assisted her in correcting the draft which was sent to her by Mr. Wallis, but it does not appear that he did anything more in those matters than to comply with her wishes. There is no evidence that her will was overborne by his, or that he had recourse even to persuasion to induce her to favor him in her testamentary disposition of her estate. It is urged that the fact that the will reached her hands through his is a circumstance significant of undue influence; but it appears that the understanding was (as Mr. Wallis testifies), not that it should be sent to Thomas or to her through him, but that it should be sent directly to her address in Philadelphia. Mr. Wallis appears to have delayed sending it merely because he lost sight of it for a while in moving the furniture and papers of his office, and it was only because he had forgotten her address and lost the memorandum of it, if he had any, that he sent it (and he did it of his own accord, and merely because he did not know how else to get it to her), to Thomas, at Newport, to be forwarded to his mother, and it was forwarded accordingly. There is no evidence of threats, restraint or coercion of any kind to produce the will; nor, as before stated, even of any importunity or persuasion. It has been repeatedly said that undue influence, like other species of fraud, must be proved, and will not be presumed. It is a conclusion and not a presumption, and the burden of proof, where

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the testator was of sound mind, is on the person who impeaches the will on the ground of fraud. "In order," said the lord chancellor in *Boyse v. Rossborough*, 6 H. of L. 2, 51, "to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis." To the same effect was the charge of Judge Grier in *Turner v. Hand (Meeker Will Case)*, 3 Wall. Jr. 88, 113; "Circumstances which should avail for the proof of fraud are such only as are inconsistent with a contrary view of the transaction, and lead, irresistibly, to that conclusion." And though fraud may be inferred, the inference cannot lawfully be drawn unless it is natural and necessary. The caveator insists that it appears that Frederick was prohibited by Thomas from seeing his mother while she was at the latter's house at the visit during which the will was prepared; but not only do Thomas and his wife swear that this was done at her request, but the evidence of Miss Inglis corroborates their statement. She testifies that the testatrix told her that she had refused to see Frederick once or twice; that the reason of it was the difficulty about the machinery, and that Frederick had called at the house to see her and that she sent word that she could not see him, but afterwards did see him. She also says that the testatrix told her she had received him coldly. The circumstances and incidents which are relied upon as the evidence of the incapacity or fraud imputed, do not seem to me to possess such weight or force as to justify the conclusion that the testatrix was incompetent, or that the will was the result of fraud.

It is not the province of the court to make wills for testators nor to defeat their testamentary intentions, where there is capacity and no fraud; and in simple justice to the accused, no less than out of regard to the rights of testators and the dictates of a sound public policy, it will refuse to impute fraud where the evidence does not necessitate a belief in its existence. It is obviously not for the court to annul a testator's disposition of his property by will on the mere ground that he has unequally or unjustly divided his estate, or even capriciously or through prejudice

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given it away from those who, in view of his natural or social relations and obligations, have undoubted claims upon his bounty or his justice, and bestowed it upon less worthy, or even upon absolutely unworthy objects.

In the language of Chief-Justice Green, in *Den v. Gibbons*, 2 Zab. 117, the validity of a will cannot depend upon the consistency of its provisions with our ideas of fairness or propriety, or even with the principles of justice and humanity; such a test of its validity would be certainly subversive of that absolute control and dominion which the law has given to every man over his own property. In his charge in *Greenwood v. Greenwood*, reported in 3 Curt. Appx. 337, Lord Kenyon, referring to the testator's prejudices against his brother, said that if those prejudices, though on improper grounds, were such as might reside in a sound mind, while it was hard that they should lead to conclusions unfavorable to his brother, yet, hard as the case might be, it was better that a thousand hard cases should take place than that the court should remove the landmarks by which man's property is to be decided. And he proceeded further to say that the testator's conduct to his brother was to be considered to ascertain whether it was the evidence of a derangement of mind or only of an unreasonable prejudice; and if it were the latter, it did not unfit him to make the will. He added, "A multitude of instances there have been where men have taken up prejudices against their nearest and dearest relations—it is the history of every week in the year, and the history of almost every family, at one time or other, that harsh dispositions have been made, that unreasonable prejudices have taken place, that one child standing equally near in blood has been preferred to another; and if once we get into digressions of that kind, then we get upon a sea without a rudder. Where will you stop? What partiality will be enough to set aside a will, and what partiality will you give way to and say the will is good? These are questions which the most correct and acute mind that ever addressed himself to the consideration of questions will not be able to settle." And here it will not be out of place to advert to the case of *Wintermute v. Wilson*, 1 Stew. Eq. 437, decided in

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the court of errors and appeals in 1877. The testator was advanced in years and enfeebled by disease, but his mental decay had not reached the point of legal disqualification. The will was plainly unjust to his wife. Besides her claim upon him, arising from her faithful discharge of her duty to him as a wife, she had for many years successfully managed his affairs, and there was reason to believe that a large part of the property which the will diverted from her was the fruit of her own exertions. Said Chief-Justice Beasley in delivering the unanimous opinion of the court, "But the misfortune is that such diversion was not without cause. Just before the making of this will she quarreled with her husband, and the anger thus kindled was not suffered to die out, but was inflamed by some of those who were likely to profit by it. But the occasion of the anger being real, there is no pretext for saying that the will is the offspring of delusion; in truth, it is the product of bad advice and a disproportioned resentment; and this clearly can lay no ground for setting it aside in a court of law. The will was properly admitted to probate." It is the duty of courts not only to uphold but to guard the right of free testamentary disposition of property. Public policy demands it. "The English law," said Lord Chief-Justice Cockburn, in *Banks v. Goodfellow*, L. R. (5 Q. B.) 549, 564, "leaves everything to the unfettered discretion of the testator, on the assumption that though, in some instances, caprice or passion, or the power of new ties or artful contrivance or sinister influence, may lead to the neglect of claims that ought to be attended to, yet the instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a disposition prescribed by the stereotyped and inflexible rules of a general law."

In the case in hand the estate is almost entirely given to one of the two children, to the disinherison of the other. A testator of sound mind is at liberty to make an absolutely unfair disposition of his property, and, in the absence of fraud, his will must

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stand. That the testatrix had a reason (one or more) for her action in making the disposition is clear, though, if of sound mind, she was at liberty to act even capriciously in the matter, and might have disinherited both sons had she seen fit, and have given her whole estate to strangers or to charity. It is proved, as before shown, that after the sale of the machinery to Frederick, her feelings towards him, in consequence of what she regarded as his unfair dealing with her in that matter, changed from love to dislike, and she harbored resentment against him. There was no delusion as to the transaction. She did sell him machinery for the price of \$20,000, and there was a difference between them in which she, on the one hand, demanded a very considerable sum of money from him as interest, or for the use of the machinery, which he, on the other, refused to pay, denying the justice of her demand, but subsequently offered \$200, which she unwillingly accepted. This appears from the caveator's own testimony. There was, then, no delusion, but a real ground for her action. This is apart from the fact that she appears to have had still another reason, viz., that Frederick was a man of business, and therefore able to take care of himself without aid from her, while Thomas was not, but was merely a man of science. In fine, the testatrix was possessed of testamentary capacity. She understood the business in which she was engaged when she made her will. She knew what her property was and who were the objects of her bounty, and the manner in which she disposed of her property. There is no proof of fraud. The will was executed with all due legal formalities. It must be admitted to probate. It will be so decreed. The decree appealed from will therefore be reversed. Under the circumstances, the costs of both sides, with reasonable counsel fees in both courts, should be paid out of the estate.

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Kingsland v. Scudder.

EDMUND W. KINGSLAND, executor &c., appellant,

v.

JOHN A. SCUDDER et al., respondents.

1. A fiduciary charged with the management of property, whether as executor or otherwise, has a right to employ counsel, when necessary or proper, to protect the estate, or to enable him properly to manage it, and the reasonable charges for such services will be paid out of the estate.

2. For the allowance of such fees out of the funds of an estate, it should appear to the court to be proper in view of the services rendered to the estate, and it is not enough that the executor and the parties interested in the estate consent to and petition the court for it. It should not be allowed unless it appears otherwise to be proper.

On appeal from decree of Hudson orphans court.

Mr. Jacob Weart, for appellant, ex parte.

THE ORDINARY.

This appeal is brought by the executor of the late Isaac W. Scudder, to review the action of the Hudson orphans court in refusing to allow him a charge of \$3,000 for counsel fees in his final account. The charge is as follows :

“Allowance is prayed for a counsel fee to Jacob Weart, who has acted as counsel to the estate in the employment of the accountant, and by the assent of Mary Scudder [one of the residuary legatees], and Isaac N. Arnold, guardian [of the others of those legatees who are infants], who have agreed to the payment of \$3,000 as a counsel fee as a just and reasonable compensation for the services rendered, and who have petitioned the court to allow the same.”

There appears to have been no proof as to what in particular the services were for which this charge of counsel fee was made, except that certain applications of the executors to the orphans

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court for authority to make investments, formed part thereof. Reliance was placed for the support of the charge in question on a petition put in by Mary Scudder, to whom one-third of the residue is given, and Isaac N. Arnold, guardian (appointed in Illinois) of the infant children of William M. Scudder, deceased, to whom the rest of the residue is given, and an affidavit of Mr. Weart. By the former, the petitioners request the court to allow out of the estate a counsel fee of \$3,000 to Mr. Weart, who has, they say, acted as counsel to the estate at the solicitation of the executor, and with their assent, and to allow the executor a commission of two per cent. as his compensation for services rendered as executor, they having agreed with Mr. Weart as counsel and Mr. Kingsland as executor, that such allowances (the amounts of which the petitioners consider reasonable) should be made. It appears that shortly after the letters testamentary were issued (in 1881), Mr. Arnold, in the interest of all the residuary legatees, came to New Jersey to examine into the affairs of the estate and direct the management thereof. He had several interviews with the executor, at which Mr. Weart was present. It was agreed that Mr. Arnold should return to Illinois, where the infant residuary legatees lived, and take out letters of guardianship there, and that Mr. Weart should act as counsel to the estate and look after the interest of the residuary legatees, who were all non-residents. Mr. Weart assumed that duty as acting for those legatees, and from that time on so acted, and carried on an extensive correspondence with them, and kept them fully advised as to the progress of the settlement of the estate and everything that pertained to their interest. In May, 1882, Mr. Arnold wrote to him, requesting him to consider himself retained as counsel for the children, and if anything was necessary to be done to secure or protect their interest, to attend to it. Mr. Weart already considered himself so employed, and did all that was required to be done to protect the interest of the residuary legatees. He made seven applications to the orphans court for authority to invest, and drew the petitions and orders thereon.

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The question of the allowance of counsel fees and commissions was, by consent, argued before the court, before the final account came up for allowance, and after hearing the matter, the court refused to allow the counsel fee, and fixed the commissions at two per cent. Mr. Weart then gave notice that he intended to appeal from the decree, if so made, and then it was proposed by Mr. Arnold to agree upon amounts for counsel fees and commissions which would be satisfactory, and the amount of \$3,000 for the former, and the rate of two per cent. for the latter were agreed upon accordingly, and it was agreed that Miss Scudder and Mr. Arnold, as guardian, should petition the court for the allowance thereof.

It does not appear, and it is not material to know, what amount was claimed for counsel fees, or what percentage was claimed on the above-mentioned hearing before the orphans court. The agreement just mentioned seems to have been a compromise, and the claim of \$3,000 for counsel fee was inserted in the account in pursuance of it. The court refused to allow the counsel fee, notwithstanding the petition and affidavit. A fiduciary charged with the management of property, whether as executor or otherwise, has a right to employ counsel when necessary or proper to protect the estate, or to enable him properly to manage it, and the reasonable charges for such services will be paid out of the estate. *Wolfe's Case*, 7 *Stew. Eq.* 223. But he will not be allowed for such work, though done by counsel, as he, in contemplation of law, is bound to do himself. In other words, if he chooses to employ others to do his work he must pay them himself; as in the case cited, where the amount paid by the administrator to an accountant for making up his account was disallowed. An appeal will lie from a decree allowing or denying counsel fees in the account of an executor, administrator, guardian or trustee. *Anderson v. Berry*, 2 *McCart.* 232; *Pomeroy v. Mills*, 8 *Stew. Eq.* 442; *Middleton v. Middleton*, *Id.* 115. In the case in hand there is no evidence what services, except the applications for orders for investment, were rendered by Mr. Weart to the executor in the discharge of his duty as such. For whatever services as counsel, rendered by Mr. Weart, were necessary

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to enable the executor to discharge his duty to the estate, there should be an allowance. But not so as to services rendered to the residuary legatees in watching over their interest or otherwise, or for doing work for the estate which the executor himself was bound to do, or which was within his province and for which his commissions are to be his compensation. Such a discrimination in charges for counsel fees was made in *Wolfe's Case*.

The application here appears to have been for the allowance of the \$3,000 on the ground (to a great extent, at least) that the residuary legatees regarded the allowance as proper, and had therefore agreed to it. But the fact that the parties had agreed upon the compensation would not of itself justify the court in making the allowance. It ought not to have made it unless it appeared that it was proper; that is, that the services were rendered to the executor, and were necessary for the protection or management of the estate. Some of the residuary legatees, as already stated, are infants. If, for the protection of their interest in the estate, it was necessary to employ counsel to watch over the settlement, their guardian will be allowed, in his account, for his disbursements for such service, but it would not be legitimate to allow them as having been paid by the executor for services rendered to him in the settlement of the estate. The refusal to allow any part of the \$3,000 was, however, an error; for there should at least have been an allowance for the fees for the applications for authority to invest, and it would have been proper for the court to inquire as to the rest of the charge, to ascertain whether it or any part of it ought to be allowed. The decree will be reversed and the record remitted to the court below, with instructions to allow reasonable compensation for so much of the services for which the \$3,000 are charged as, on the principles above enunciated, are legitimate charges by the executor, or the allowance may be made here if that course is preferred.

Aldridge v. McClelland.

THOMAS ALDRIDGE, appellant,

v.

SARAH J. McCLELLAND, respondent.

1. Where an executor charged the estate for money paid for repairs and insurance premiums on the real estate—*Held*, that not being bound by the will to pay for such repairs and premiums, he could not be allowed for them in his account, in the absence of an agreement, as so much paid to the devisees on account of their interests in the personal estate.

2. The executor mingled the funds of the estate with his own, and used them for his own purposes.—*Held*, that he was chargeable with interest. *Held*, also, that he was properly required to pay the costs of the exceptions which were rendered necessary by the charges, which plainly were not allowable.

Appeal from decree of Essex orphans court.

Mr. Theo. Ryerson, for appellant.

Mr. John Whitehead, for respondent.

THE ORDINARY.

Thomas Aldridge, the appellant, proved the will of Richard Parkes, deceased, March 10th, 1873. He filed an inventory on the 27th of that month, and from that time until May 21st, 1879, he filed no account. In January, 1878, Sarah J. McClelland, legatee and devisee under the will, by her petition to the orphans court, stated that for then over four years he had filed no account; that proceedings in bankruptcy had been instituted against him, and that he had therein been adjudicated a bankrupt. Thereupon the orphans court, by their order of January 29th, 1878, required him to account or show cause on the 12th of February then next, why he should not do so. On the last-mentioned day the court made an order stating that it appeared

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that the estate was insecure in his hands, and requiring him to give bond on or before the 19th of that month in the sum of \$6,000, with sureties, for the faithful performance of his duty as executor, and restraining him in the meantime from selling, disposing of or conveying away the estate, or any part thereof. By that order, the hearing of the order of the 29th of January was postponed to the 19th of February. The executor did not account, but appealed from the order to this court, which affirmed the order, and he thereupon appealed to the court of errors and appeals, with like result. He did not give the required bond, and on the 20th of May, 1879, the orphans court, therefore, ordered him to show cause on the 3d of June then next why the letters testamentary issued to him should not be revoked, and he be removed from his office of executor. On the 20th of May, 1879, the orphans court ordered that he be attached for contempt of court for not obeying the order to account. On the next day he filed his account. On the 8th of July, 1879, he was removed from his office, and Elwood C. Harris appointed administrator *de bonis non cum testamento annexo*, in his stead. By order of July 15th, 1879, he was ordered to pay immediately to the administrator the balance, \$1,880.47, which, by his account, he admitted he had in his hands. He did not comply with that order, and on the 30th of July, 1879, an order requiring him to show cause why an attachment for contempt should not issue against him for his disobedience was made by the orphans court. From the order requiring him to pay over the balance he appealed to this court, and on its affirmance here he unsuccessfully appealed to the court of last resort. He subsequently paid the balance over. Exceptions to his account were filed both by Sarah J. McClelland and the children of the testator, also devisees under the will. The orphans court, on hearing the exceptions, struck out of the account and disallowed two charges of cash paid Mynard Coeyman (together, \$32.75), and one of cash (\$195.71) paid George Cummings; two charges for cash paid for insurance premiums (together, \$73), a charge of \$25 cash paid Sarah J. McClelland, and disallowed

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the executor's charge of commissions (\$219.46), and directed that he be charged with simple interest at seven per cent. per annum on the balance which would appear on the restatement of the account, from March 24th, 1874, to July 4th, 1878, and at six per cent. per annum from that date to July 29th, 1881, the time when the apparent balance of his account, \$1,880.47, was paid over by him pursuant to the order of the court, as of which date the \$1,880.47 were to be deducted from the amount of the balance decreed to be due, and the interest thereon computed as just mentioned; and that the executor be charged with interest at six per cent. per annum on the balance, after such deduction to the time of making the decree; and they ascertained the last-mentioned balance to be \$1,738.66, which they ordered the executor to pay to the administrator, and ordered the executor to pay out of his own funds the costs of the petition and proceedings in the orphans court. From that order the executor has appealed to this court.

The will gives to Sarah J. McClelland the testator's brick house and lot in fee, and the rents, issues and profits of another property, known as the shop, for life. It also gives her an annuity of \$180, to be paid in monthly payments by the executor.

It appears, by the account, that the payments made to Coeyman and Cummings were made at the request of Sarah J. McClelland, for repairs to the brick house. They were for work done to the house for her after the testator's death, and therefore after she became the owner of the property in fee. Clearly, they are not proper charges against the estate, and therefore are not to be allowed to the executor in the account. It is urged on behalf of the executor that they should have been allowed as payments made to Sarah J. McClelland. But there was nothing before the court to justify such an allowance. There was no evidence that the payments were made under an agreement that they were to be regarded as payment of so much of the annuity, and they do not appear in the account as payments to Mrs. McClelland, but as charges against the estate. The charge of \$25 cash paid to her was properly disallowed. It appears by the

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testimony of the executor himself, not only that he cannot say that the money was paid on account of the estate, but he says he is inclined to think it was not. And Mrs. McClelland, in her testimony, swears that it was not paid to her on that account. Of the money paid for premiums for insurance, \$40 are said to have been paid in May, 1876, for a policy on the brick house, and \$33 for insurance on what is, I presume, the shop property. And here it should be remarked that there is an error in the order of the court below, in reference to the payments for insurance premiums which were disallowed. They are referred to as charges under date of March 10th, 1873, but it appears by the record that the exception of Mrs. McClelland as to charges of that date for money paid for insurance premiums was withdrawn, and it does not appear that any exception was made to them by the children of Mr. Parkes, but there was as to those of May, 1876. The testimony on the subject, therefore, undoubtedly refers to the charges for cash paid for insurance premiums under date of May 9th, 1876, and to them alone.

He insured the property for the estate of Mr. Parkes, but the brick house, as before stated, became, at the death of the testator, the property of Mrs. McClelland, by virtue of the devise in his will, and so too she became the owner of a life estate in the shop property. The money paid by the executor for insurance on her property, of course is not a proper charge against the estate. It does not appear that he was under any obligation whatever as executor to insure the property. The charges were properly disallowed.

The executor was justly chargeable with interest on the money in his hands not expended in the payment of claims against the estate. He never kept it separate from his own funds, and he admits that he used it for his own purposes. The money from which the balance is derived came to his hands May 24th, 1874. The court below by mistake charged him with interest from March 24th. It also omitted to give him credit for \$219.46, the amount charged in his account for his commissions, which amount he paid over to the administrator pursuant to an order

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of the orphans court made August 4th, 1881. He ought also to have been allowed a payment of \$57.80 made by him out of the estate, in accordance with an order of the orphans court to that effect, for a copy of the stenographer's notes of the testimony of the witnesses ordered by the court to supply the place of a lost copy. He was properly required to pay the costs of the petition and the proceedings thereon, and of the exceptions. The petitions and proceedings thereon were due to his failure to discharge his duty to the estate and to comply with the orders of the court. The matters in his account which were excepted to were not of a doubtful character. According to this decision the balance due from him is \$1,375.79 instead of \$1,683.82 as found by the court below. The balance is ascertained as follows:

Amount of debits.....	\$4,736 50
Amount of credits claimed by the account, including	
commissions.....	\$2,856 03
Deduct disallowances.....	545 92
	<u>\$2,810 11</u>
Add costs on settlement, not included in the account—	
Advertising.....	\$6 00
Court and surrogate.....	17 80
	<u>23 80</u>
	<u>2,833 91</u>
	\$2,402 59
Interest at seven per cent. per annum on this amount, from May 24th, 1874, to July 4th, 1878, four years, one month and ten days...	691 40
Interest from July 4th, 1878, to July 29th, 1881, at six per cent. per annum, on \$2,402.59.....	442 33
	<u>\$3,536 32</u>
Deduct amount paid July 29th, 1881.....	\$1,880 47
Also amount paid in pursuance of order of August 9th, 1881.....	219 46
Also amount of stenographer's bill, paid Sept. 30th, 1880,	57 80
Interest thereon.....	2 80
	<u>2,160 53</u>
	<u>\$1,375 79</u>

The decree of the court below will be modified accordingly. The costs of the appeal should be paid out of the estate.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY.

ON APPEAL FROM THE COURT OF CHANCERY,

NOVEMBER TERM, 1882.

JOSEPH J. SUMMERBELL, appellant,

v.

M. ALICE SUMMERBELL, respondent.

On appeal from a decree advised by *Barker Gummere, Esq.*, sitting as advisory-master, denying the application of the appellant for a divorce. The decree was affirmed by an equally divided court—DIXON, SCUDDER, VAN SYCKEL, CLEMENT and GREEN, JJ., voting for affirmance, and DEPUE, MAGIE, REED, COLE and KIRK, JJ., voting for reversal. An opinion in affirmance of the decree was prepared by Mr. Justice Van Syckel, but was not delivered or filed, owing to the notice of an application by the appellant for a re-argument, on the ground

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that only ten of the fifteen qualified judges of the court had heard the argument, and that an affirmance of the decree below had been obtained by an equal division of the judges.

Mr. Elwood Harris and *Mr. John P. Stockton, Atty.-Gen.*, for petitioner.

In the court of king's bench, when the judges are equally divided in opinion upon a writ of error, it seems there can be no rule for affirming or reversing the judgment without consent; and therefore, in the case of *Thornby v. Fleetwood*, 1 *Str.* 379, the court being divided in opinion, a rule was made, with the assent and at the instance of the lessor of the plaintiff, to expedite the determination of the cause in the house of lords, whereby it was ordered that the judgment should be affirmed.

But in the exchequer chamber it is the practice, upon a division, to affirm the judgment, as was done in the case of *Derghon v. Greenville*, 1 *Show.* 36. And so is the practice in the house of lords, which depends on their mode of putting the question to reverse the judgment, a majority being required to reverse it. *Tidd's Pr.* (4th *Am. ed.*) 1178.

In New Jersey the practice is not settled. The case of *Potts v. Imlay*, 1 *South.* 332, was argued a second time, at the request of the court. The case of *Mickel v. Matlack*, 2 *Harr.* 86, was argued a second time, at the earnest request of the plaintiff's counsel.

In the case of *Voorhees v. Horn*, 1 *Zab.* 81, Green, C. J.,

NOTE.—The following additional New Jersey cases show the effect of an equal division of the court:

If the court of appeals is equally divided, the chancellor's decree is affirmed, *Flavell v. Flavell*, 7 *C. E. Gr.* 599; *Kaighn v. Fuller*, 2 *McCart.* 501; so, if the supreme court is equally divided on a writ of error to the circuit, *Huncks v. Francis*, 3 *Dutch.* 55. If the court is equally divided in opinion on the admission of evidence, it must be refused, *Price v. Tallman*, *Coxe* 448; *Jessup v. Cook*, 1 *Hal.* 440; *Jackson v. Miller*, 1 *Dutch.* 90. An order of removal of a pauper is not affirmed by an equal division of the court of quarter sessions on an appeal, *Elizabethtown v. Springfield*, *Pen.* *475; and *Kirkpatrick*, C. J., p. *479, seemed to think the rule applied to any writ of error, citing *Hamilton v. Branden*, 1 *Str.* 318. On a motion in the common pleas to nonsuit a plain-

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said: "In the present case, the court being equally divided in opinion, the debtor had failed to satisfy the court that his conduct had been fair, upright and just." And, consequently, he was not entitled to his discharge. Upon an equal division of the court, a re-argument of the cause would manifestly have been proper. And had an application been made for that purpose, it is fair to presume that the court, in the exercise of a sound discretion, would have continued the case and directed a further hearing. But no such application had been made, nor was any order for this purpose made by the court.

The case of *Gratz v. Wilson*, 1 Hal. 423, Kinsey, C. J., and Smith, J., who were alone present at the first argument, differed in opinion, Boudinot, J., having been since appointed, was re-argued before all the judges at the next term.

In the case of *Murphy v. Farr*, 6 Hal. 221, Ewing, C. J., said: "We do not deny the power of reconsideration. It is, however, of a most delicate nature, to be exercised in extraordinary cases only, and with the utmost caution and circumspection, especially when not suggested by the court, but sought by the party against whom a decision has been made; and when so sought, the motion should never be heard without full opportunity to the other side to resist."

In the case of *King v. Ruckman*, 7 C. E. Gr. 551 (decided in 1871), it was held by this court that after a cause had been heard upon the merits, the judgment properly entered and the papers remitted to the court below, the court had no further jurisdiction

tiff in an appeal from a justice's court, "the court * * * being equally divided, the defendant took nothing by his motion," *Cox v. Baird*, 6 Hal. 107. If, on the trial of an appeal from a justice's judgment, the court of common pleas is equally divided on the question of the right of the plaintiff below to recover, and dismisses the appeal, a *mandamus* will issue to re-instate it, *Strader v. Freeholders of Sussex*, 3 Gr. 433. If an executor prays allowance for an item in his account, and the court is equally divided thereon, it ought to be stricken out, *Kirby v. Coles*, 3 Gr. 441. A refusal to charge a jury, on a request which ought to have been charged, because the court was equally divided, is error, *Linn v. Ross*, 1 Harr. 57. A notice annexed to a plea was, on demurrer, sustained by an equal division of the court, *Morris Canal Co. v. Van Vorst*, 1 Zab. 100.—REP.

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in respect to the case. It was also held that "this court may order a re-argument while a cause is still pending, and before the papers had been remitted."

The rule as laid down by the chief-justice in *King v. Ruckman*, is again affirmed in 1875, in *Cassedy v. Bigelow*, 12 C. E. Gr. 505. The court said "that the power to grant re-arguments should be but sparingly exercised, and, *perhaps*, in no case, unless the court itself intimates a desire for the argument to be repeated." This, however, was a case where the record had been remitted to the court of chancery, and the exact point ruled was that on a second appeal in the same cause, the points already decided by the court are not open to debate, unless specially directed by the court.

In the case of *Wagner v. Jackson*, 4 Vr. 454, in March term, 1866, this court ordered a re-argument, on the ground that, owing to unavoidable accident, only a bare majority of the court was present when the case was argued, and that it was eminently proper that a case in which the constitutionality of an act of the legislature was called in question should be heard and decided by all the members of the court competent to act. At the November term previous, a majority of the judges had expressed an opinion in favor of reversing the judgment of the supreme court.

While the question in the present case is not a constitutional one, yet it is insisted that the facts of the absence of *one-third of the court* and the *equal division* of the members who heard the argument, present a stronger case than existed in the case referred to above. See *Minutes of the Court of Appeals*, No. 4, pp. 483, 493.

The rule in the supreme court of the United States is, undoubtedly, that no re-argument will be granted in any case, unless a member of the court who concurred in the judgment desires it, and when that is the case it will be ordered without waiting for the application of the counsel. But this rule is confined to cases in which judgments have already been rendered. *Brown v. Aspden*, 14 How. 25; *Phillips's Prac.* 246; see *Mayor v. Miln*, 8 Pet. 118.

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1. In the case we are considering, judgment has not been entered.

2. The court were evenly divided, and the decision could only be reached by the form in which the question was put.

3. An application for a rehearing was made on the spot, and the record was ordered to be retained, "to the end that the counsel for the appellant might have an opportunity to make a motion for a re-argument of the case," viz.: "It is ordered on this 10th day of July, A. D. 1882, that the record in the above-stated cause be retained by the clerk of this court until further ordered, to the end that the counsel for the appellant may have an opportunity to make a motion for a re-argument of the cause."

4. The case below was heard by a master. This court heard it in the absence of five judges. Five were for reversal, five for affirmance and five did not vote. The result is, that the law in reference to the application of the canon, as laid down by the master, will be made the law of this state by three law judges and two lay judges of the court of errors.

Mr. Woodbury D. Holt and *Mr. Mercer Beasley, Jr.*, for respondent.

On motion of GREEN, J., a re-argument before the full bench was ordered.

SMITH et al., executors, appellants,

v.

GAINES et al., respondents.

By the sixth clause of the statute of descents, a great-uncle of an intestate is of equal degree of consanguinity with a cousin of such intestate.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Smith v. Gaines*, 8 Stew. Eq. 65.

Smith v. Gaines.

Mr. B. Williamson, for appellants.

Mr. H. C. Pitney, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

The question before this court relates to the descent of lands in this state by force of the sixth section of the statute regulating descents of lands. *Rev. p. 298.*

The controversy originated in the court of chancery on a bill filed for partition, and in that proceeding his Honor Vice-Chancellor Van Fleet decided that the complainant, who is a great-uncle of the intestate, was equally entitled to the land with the defendant, who was a cousin of such intestate. This distribution of the title was the only point in litigation, and is the only question this court is called upon to adjudge.

In the cases of *Taylor v. Bray*, 3 Vr. 182, and *Schenck v. Vail*, 9 C. E. Gr. 538, it was conclusively settled as the law of this state, that in ascertaining the persons who should stand as next of kin, and to whom the lands of intestates should go by force of the statutory provision alluded to, the rule of computation of the degree of consanguinity should be the canon of the civil and not that of the common law. The consequence is, that if such rule, in its purity, is to be applied in this case, there can be no doubt as to the correctness of the decision rendered in the court below, for, by the test of that rule, it cannot be denied that these parties are related to the decedent in the same degree of kindred.

But it is insisted, in behalf of the defendant, that this rule of computation is not to be applied irrespectively of the canons of the common law, but is subject to qualification by them. And in turning this theory to account, it is contended that to make the first common ancestor the *terminus a quo* is imperative

NOTE.—For cases showing the application of the rules of descent, see *Bailey v. Ross*, 5 Stew. Eq. 544, note; also *Hoffman v. Bacon*, 50 Ind. 379; *Bruce v. Baker*, Wils. (Ind.) 462; *Wetter v. Habersham*, 60 Ga. 193; *Van Sickle v. Gibbons*, 40 Mich. 170; *Pond v. Bergh*, 10 Paige 140; *Pitchard v. Turner*, 3 Hawks 435; *Caldwell v. Black*, 5 Ired. 463; *Afflick's Case*, 3 McArth. 95; *Oliver v. Vance*, 34 Ark. 564.—REP.

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at common law, and therefore the grandfather, in the present genealogy, cannot be passed and the line carried back to bring in the complainant through the great-grandfather. But the reason why, at the common law, the issue of the nearest lineal ancestor was preferred over the issue of one more remote, was that by the rule of computation of that system the former were nearer of kin than the latter.

This result was occasioned by the doctrine of representation. Blackstone says: "The issue of descendants, therefore, of John Stile's brother are all of them in the first degree of kindred with respect to inheritance, those of the uncle in the second, and those of the great-uncle in the third, as their respective ancestors, if living, would have been, and are severally called to the succession in right of such their representative proximity." But when the doctrine of the representation of the ancestor by his descendants, no matter how far removed, has been abolished, why should the doctrine founded on it, that the collateral kindred claiming through the nearest ancestor should be preferred to collaterals claiming through a common ancestor more remote, be retained? Such retention would have no tendency, as is supposed in the brief of the counsel for the appellant, to give the inheritance to those who have in their veins more of the blood of the ancestry of the intestate. It is certain that in the present case these two contestants have the ancestral blood of the intestate in the same proportion; that is to say, such blood has been affected by two divisions in descending through each line respectively. This complainant and this defendant completely fulfill the description of the statutory clause in question, for they are "of equal degree of consanguinity" with the decedent. It is true that in the case of *Taylor v. Bray*, 3 Vr. 182, it was held that running parallel with this tenth clause of this statute regulating descents, and in a measure modifying it, the canon of the common law which forbade the lineal ascent of the inheritance, still existed in our system of law, but such result was reached from what were deemed clear indications apparent in the general legislative plan with respect to descents. But no such implications are perceived which tend to sustain or favor the view that this other canon of the common law has been designedly retained;

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indeed, every reasonable consideration and inference seem to wear an aspect adverse to such a theory. To admit such a doctrine would introduce much confusion in the entire subject. The vice-chancellor has very clearly stated the legal rule applicable in this instance, and the decree advised by him should be affirmed.

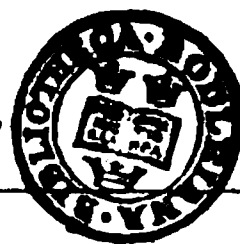
PATERSON, J. (dissenting).

After examining this matter with more than ordinary interest and care, particularly since ascertaining that I disagreed in opinion with my associates, I propose at this time to express briefly the reasons of this dissent.

The single question to be determined here is whether, under the facts and circumstances of the case, a first cousin is entitled to the whole of the premises for which this suit in partition is brought, or must share the land equally with a granduncle. This determination depends solely upon the construction of so much of the sixth section of the statute as is enacted in these words, "and shall leave several persons of equal degree of consanguinity to the person so seized, however remote from such person the common degree of consanguinity may be." No doubt has been suggested on the argument of the application of the statute to one survivor.

Consanguinity, in the original Latin signification of the word, implies nearness of blood. Evidently the term is intended to be used in this section of the law in such a sense. The construction should fulfill the purpose. I fail to discover how any arbitrary artificial rule, as applied here, can answer the clear legislative design.

Edward Ennis Graham No. 3 was the person last seized, and who took all of the estate. He was an only child, an infant of the age of six years at the time of his death. He left no father. No claimant appears in this line. Passing his father in the ascending degree, his grandfather is reached. This grandfather, also deceased, from the facts stated in the record, is an ancestor common to such person last seized and to the appellant. In this case the common degree of consanguinity referred to in the statute can be no more remote than this common ancestor thus



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found. Now this common ancestor, it is plain, must have been and was nearest in blood to Edward Ennis Graham No. 3.

Robert L. Graham is found to be in this line, and Edward Ennis Graham No. 1 is not. He is a missing link. This should be conclusive, and really is all there is in the case. The matter is determined, the statute is fulfilled, the common ancestor, who here is the one most remote from the person last seized, has been found, and the collateral nearest in blood is ascertained. The grandfather is such common ancestor, the first cousin is such nearest collateral, and no person who was living at the death of the *propositus* can be discovered in that line of equal degree of consanguinity with him.

Nor can this conclusion be avoided or defeated by excluding the right of representation, because the grandfather is one degree nearer to the person last seized, or consanguinity must have a signification other than proximity of blood. The application of a general rule, without regard to a fact so self-evident as this, may produce a result like that proposed to be declared here, but such result can be only strained and forced. It does not, for the simple reason that it cannot, ignore this substantive fact. The significance of such fact cannot be evaded. No *stare decisis* is of any avail in determining consanguinity in this case. Two common ancestors cannot be the nearest in blood. One must be a remove from the other. The collateral consanguinity contemplated by the statute can be no other than nearness of blood. The common blood of the father is nearer by one degree than that of the grandfather and granduncle, the same as the grandfather is nearer than the great-grandfather. Turn any way, and there is no escape from this conclusion. The wisdom of the civilians may be invoked to change or conceal the fact, but that remains still.

In *Schenck v. Vail*, 9 C. E. Gr. 538, the decision was right, as I understand, not because it was the result of the application of the rule of the civil law, but for the reason that the plain intention of the statute was carried out. Here it is wrong for a reason directly the opposite. To seek for a common ancestor beyond and behind, and farther removed than the first one found, is to create a rule

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of construction superior and antagonistical to the statute. That neither adopts nor sanctions, prohibits nor rejects any particular method. The crucial test is nearness of blood, and any rule which defeats that, clearly is artificial and constrained in character. A first cousin is nearer in consanguinity than one of the next remove, and also than a granduncle, for just the same plain, perspicuous and pertinent reason, namely, one degree of proximity. The suggestion in the brief for the appellant, that it never has been hinted or implied in the decisions of any court in New Jersey, that a granduncle inherits with a first cousin, is striking and strong. In connection with it, I venture to say that the number of those who believe the law of the state is, or should be such in that respect, will be found to be as small in comparison as that of those who prefer the currency of a banking corporation to that of the United States.

Agreeing with the opinion in *Schenck v. Vail*, that legislative intent should govern the construction of the statute, I ask now if the rule of the canon or common law was to be overthrown there, when not in harmony with the new scheme, why should not the rule of the civil law go down here under similar circumstances? Adopting the phraseology of that opinion, I think the application of the latter rule in this case must frustrate the paramount idea of proximity of blood; here that rule becomes artificial, and will defeat the order of nature prescribed by the statute. As that stands, each case must be a law unto itself, as it may come up for determination, under any rule which produces a result in harmony therewith, whether of the canon, civil or common law, or of neither. Here, while the result follows the application of the rule of common law, it has the merit also of being in unison with common sense and common opinion. I must regard the decision in *Schenck v. Vail* as settling only the principle of that case, or any other that may arise analogous thereto; it should not be recognized in this, because it does not fit the circumstances. Being satisfied most fully that Edward Ennis Graham No. 3 left no relative of equal degree of consanguinity with his cousin, the appellant, my opinion is that Robert L. Graham is entitled to the whole, not simply half the

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cob of the premises in controversy, and the decision below should be reversed. When an ancestor common to the person last seized, and any relative collateral to the intestate is reached, it would seem axiomatic that a relative not found in such line cannot be equal in proximity of blood to one appearing therein.

This view is sustained by the remarks in a collection of "The Institutions of the Law of Scotland," by Sir George McKenzie, in 1706. It is laid down there on page 166, that, failing descendants, the succession ascends, first to the father, here Edward Ennis Graham No. 2, then to the brother of the father, in this case C. Montrose Graham, failing him and brothers and sisters, next to the grandfather, here Charles M. Graham, and, after him, to his brothers and sisters according to the propinquity of blood, and so upwards as long as any propinquity can be proven. The same idea is to be found expressed in "Rutherford's Institutes," vol. II. p. 420, where it is said, "In determining which is the next line, we are to go back, not to any remote ancestor, but only to the next immediate ancestor, from whom the line that is extinct, and some other line not extinct, were derived." He illustrates his position by a diagram very similar to one of those in the brief of the appellant. While I do not refer to either of these volumes as an authority analogous wholly to the principle of the present case, still they are pertinent to establish the fact that the writers regarded the blood of a grandfather as nearer in propinquity than that of a great-grandfather. It must follow that those who claim under the great-grandparent cannot be of equal degree of consanguinity with those who claim through the grandparent. Therefore, Edward Ennis Graham No. 1 was not entitled to succeed to the inheritance of the premises with Robert L. Graham.

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For affirmance—THE CHIEF-JUSTICE, DEPUE, DIXON, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN, KIRK, WHITAKER—12.

For reversal—PATERSON—1.

Hesketh v. Murphy.

MARY ANN HESKETH, appellant,

v.

JOHN MURPHY et al., executors and trustees &c. of William S. Malcom, deceased, respondents.

1. A bequest of a fund in trust, the annual interest thereof to be employed by designated trustees for "the relief of the most deserving of the poor of the city of Paterson aforesaid forever, without regard to color or sex, but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund"—*Held*, valid as a charitable use.

2. The power to dispense the fund carries with it, by implication, the power to select the particular beneficiaries.

On appeal from a decree of the chancellor, whose opinion is reported in *Hesketh v. Murphy*, 8 Stew. Eq. 23.

The will of William S. Malcom, dated December 18th, 1871, after creating certain trusts in favor of his wife &c., contained the following clauses, viz. :

"And after the death of my said wife, I hereby empower and direct my said trustees or trustee for the time being of this my will, to employ the annual income of the said moneys so invested, and from time to time to be invested, for the relief of the most deserving poor of the city of Paterson aforesaid forever, without regard to color or sex, but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund.

"And for the purpose of preserving and continuing a perpetual succession of trustees for the purpose of carrying into full effect the provisions of this my will, I do hereby empower my said trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or if more, then I direct and hereby empower the proving executors or executor for the time being, or the administrators or administrator for the time being of the last surviving trustee, to substitute by any proper writing under his, her or their hands or hand, any fit person or persons, in whom alone, or as the case may be, jointly with the surviving or continuing trustees or trustee, my trust estate shall vest or proper assurances be vested."

Messrs. Bolton & Gourley, for appellant.

Mr. H. A. Williams, for respondents.

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The opinion of the court was delivered by

BEASLEY, C. J.

This bill has been exhibited by the sister of William S. Malcom, deceased, for the purpose of obtaining a judicial construction of those certain clauses of his last will which are prefixed to this opinion. The testamentary provision thus put to the test is a charitable bequest, and the view which the counsel of the complainant pressed upon the court was, that such bequest is void, on the ground of its indefiniteness with respect to its objects.

Upon recurring to the language of that portion of the will which is thus impugned, it will be found that the annual income of a certain fund, which is in the hands of certain trustees appointed by the testator, is to be employed by them for the relief of such of the most deserving poor of the city of Paterson as are not intemperate, lazy or immoral. The testator has not left his intention in any wise in doubt. His purpose is plainly charitable in the legal sense. He has constructed a trust to carry such purpose into effect, and the class of persons who are to be his beneficiaries is clearly defined. But the contention is, that the persons who from time to time are to compose this class of beneficiaries must be possessed of certain specified qualifications distinguishing them from their associates in poverty in the city of Paterson, and such qualifications are of a kind not easily ascertainable, and inasmuch as a power of such ascertainment is not by the will conferred upon any one, the gift cannot be applied to its objects, and is therefore void.

That a charitable use may be inefficacious on account of the indefiniteness or unascertainability of its purposes or objects, is readily admitted. Nor is it denied that certain gifts of this kind which, under some circumstances, would be put into effect by force of the ancient English legal system, would, under like conditions, prove unavailing if brought *sub judice* in this state. In England, the lord chancellor, in matters of this kind, transcends judicial methods, and will effectuate one of these bequests where the general purpose of the donor is charitable, although the par-

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ticular purpose which has been designated by him has failed and no trust has been created ; but this is by force of a prerogative derived from the king, who is said to possess it as *parens patriæ*. And it is this latter extraordinary power which has been almost universally conceded not to belong to the courts of this country. But with the exception of this prerogative, I am not aware that the court of chancery of this state is devoid of any power which has ever been exerted by an English chancellor with respect to the construction, regulation or enforcement of devises or bequests to charitable uses.

Our equitable system is a copy and counterpart of the English chancery, and does not differ from it except wherein it has been varied by positive law, ancient custom or by conditions of life plainly incompatible with its regulations. In the main, the equitable jurisdiction exercised in this state can be expressed, and can be expressed only, in the terms that define the boundaries of its archetype. Such is the admitted condition of all our superior tribunals, for their essential substance and qualities are derived to us, as a people, by descent, and do not exist by mere legislative sanction. Hence it would seem to follow, by irresistible inference, that whatever power touching charitable gifts was originally, as a purely judicial function, vested in the chancellor of England, is vested in the chancellor of this state, for there is no statutory law, as I think, nor custom, curtailing such power, nor is its exercise inconsistent, in any degree, with our social or political situation. It is true that the English statute of charitable uses is not in force in this state, and, so far as such statute may be said to have enlarged the sphere of equitable jurisdiction over this subject—though the supposition seems to me unfounded—to that extent the judicial power of our chancery may be wanting. But the present occasion does not call for the consideration of the involved and much-contested question as to the effect of this act over the equitable doctrine of charitable uses, for whether such enactment is to be regarded as having added something to the extent of the equitable cognizance over the subject, or, as Lords Hardwicke, Eldon, Redesdale and other chancellors declared, created no new jurisdiction, but merely provided a novel

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mode of proceeding in cases of the misappropriation of charitable funds, still it has been made certain by modern research that the primitive and inherent powers of a court of equity in this domain are *sui generis* and of a very extensive character, and, as has been above stated, whatever such original authority was, it exists in full vigor in the hands of the chancellor of this state, and it is in accordance with this theory that the few judicial examinations of this subject which have taken place in our courts have been conducted. Thus in the case of *The New York Annual Conference Ministers Mutual Assistance Society v. Executors of Clarkson*, 4 Hal. Ch. 541, the bequest was in the following words:

"I give and bequeath unto the New York Methodist Conference Society, for the support of old, worn-out preachers, the sum of three thousand dollars."

The complainant in the case, and which was thus misdescribed in the will, was an incorporated body whose purpose was to raise funds for the relief of such of its members, who were all ministers and preachers of the gospel attached to and connected with the New York conference, as were in necessitous circumstances through age, disease or other natural infirmity, as also the needy wives and children, widows and orphans of its members. This bequest was sustained as a charity notwithstanding its beneficiaries were a sub-class of the beneficiaries of the corporation, which sub-class of necessity would have to be selected, and no express powers to make such selection had been given by the testator. A similar doctrine was enforced in *McBride v. Elmer's Executors*, 2 Hal. Ch. 107, which was decided in the year 1847. A fund of \$1,000 was bequeathed to "The Bridgeton Trustees for Free Schools," the interest to be applied annually for ages, as far as might be practicable, for the tuition of poor children without regard to denomination or color, in the elements of English literature. In this case, likewise, there was a misnomer of the trustees, and there was no power in terms conferred to settle who came within the class appointed to take as beneficiaries, yet, nevertheless, the court, after a learned argument, sustained the

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testamentary disposition as a charitable use. The following are cases in which, in the court of chancery, similar views have been expressed and like judgments have been rendered : *Mugie v. German Evangelical Dutch Church*, 2 Beas. 77 ; *Mason v. Methodist Episcopal Church*, 12 C. E. Gr. 47 ; *Stevens v. Shippen*, 1 Stew. Eq. 487. And that the peculiar doctrine of the English law relating to charitable uses, so far as the same rests on judicial functions, is plainly recognized and enforced in some measure by this court appears in the cases of *De Camp v. Dobbins*, 4 Stew. Eq. 671 ; *Norris v. Thomson*, 5 C. E. Gr. 489 ; *Attorney-General v. Moore*, 4 C. E. Gr. 503.

This being the condition of the judicial authority over this subject in this state, it becomes at once evident that all but one of the decisions which are so numerous, and which are pressed upon the attention of this court in the brief of the counsel of the appellant, cannot be looked upon in the light of authorities. With the single exception just noted, and which is an adjudication which will be presently referred to more at large, the cases in question are examples of gifts that might be devoted to purposes other than charitable uses, or are determinations of courts existing in jurisdictions in which the doctrine derived from English sources that regulates the subject of such charities, has no place, and in which bequests for such objects are regarded as private trusts, and are construed and regulated on that basis. To the former of these two classes of cases the English cases which are cited appertain, for they are either private trusts, or, like the case of *Norris v. Thomson's Executors*, the bequests in question embrace a use other than a charitable one. It would serve no useful purpose to consider those references in detail. It is enough to say that they have been carefully examined, and that they are not pertinent on the present inquiry. In the other class, decisions are cited rendered by the courts of Maryland, North Carolina and New York ; but inasmuch as in these states it has been declared that the rules to be applied in the construction and administration of trusts for charitable uses are, in their respective jurisdictions, the same as are the rules by which private trusts in favor of individuals are adjudged, they can have

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no influence on the judicial mind in this state, in which an entirely different system, as has been already stated, has always prevailed. But I have alluded to an exceptional case to be found among the citations of counsel of American cases, and that case is the decision in *White v. Fisk*, 22 Conn. 31. The bequest in that case was in these words :

"Any surplus income that may remain to the extent of \$1,000 per annum, I direct to be expended by my said trustees for the support of indigent, pious young men preparing for the ministry in New Haven."

The judgment was that the gift was void, as the objects of the benefaction were indefinite, and that no power was conferred on the trustees to make them definite by selection. This case is certainly in all respects much in point, and in the jurisdiction in which it occurred and was decided, the equitable rules which prevail with respect to this branch of jurisprudence, appear to be very similar to those that are in force in this state. But it seems to me very clear that the court, on the occasion in question, fell into error in the application of one of the principles belonging to the subject adjudged by it, and I therefore agree to the criticism of Mr. Perry, in his excellent treatise on Trusts, that this decision is not one that is likely to be followed.

The mistake referred to consists in the assumption after, apparently, but a slight consideration of the topic, that there was no power to select the objects of the charity lodged by the testator in the trustees, whereas, as I am constrained to think, in view of the very liberal rules of construction which have always been declared to be applicable to occasions of this character, such power was clearly conferred upon such officers. In such matters the paramount business is to ascertain from the language of the will, as explained by the subjects to which it pertains, the purpose of the testator, and if such purpose be not illegal, and can be plainly ascertained, to carry it into effect. And it is to be remembered that it is the acknowledged doctrine that in all matters of construction courts are bound to lean in favor of charity rather than against it. And, indeed, so far has this legal

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favoritism been carried that it has been for ages the settled rule in the English law, and has been in this country often regarded as the true principle, that when a gift has been placed in the hands of a trustee to promote a charity, and which, from the mutation of circumstances, had become incapable of fulfillment, such gift was to be applied by the courts, exercising a purely judicial authority, to some cognate object, on the ground that it was the presumed intent of the testator that the fund so set apart as a benefaction should not, in any event, return to his estate. The present case does not call for any opinion on the important question how far, in the application of simply judicial standards, the courts of this state would undertake to exercise the doctrine of *cy pres* by construction; the subject is referred to only for the purpose of exemplifying with what strength of favor charitable bequests are regarded by the courts. But without resorting to a method of interpretation which, until it has received the sanction of the courts of this state, must be considered as of questionable validity, and following none but the ordinary guides in the construction of wills, I cannot doubt that the inevitable conclusion must be that the testamentary disposition in the case cited from the Connecticut reports, as well as the one now under consideration in this court, confers upon the trustees not only the power to distribute the funds confided to them, but, as a necessary incident to that function, also the right to select the beneficiaries. It is the ordinary doctrine that when an act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intentment of law, comprised in such grant of power. A common example of this rule is presented in cases in which a power of sale is given by a will without in terms specifying by whom it is to be exercised, but if the proceeds of the sale are directed to be distributed by an executor or trustee, in such instances it has been held in numerous decisions that such executor or trustee will take, by implication, the power of selling, unless some other intent is discoverable from the whole will. *Newton v. Bennet*, 1 Bro. C. C. 135; *Bentham v. Wiltshire*, 4 Madd. 44; *Blutch v. Wilder*, 1 Atk. 420.

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When, therefore, in the Connecticut case and in the present case, a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications, which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it, on the ground of the principle just mentioned, the incidental and necessary power of selection. That such was the intent of the testator would seem to be plainly manifest from the nature of the thing, the doing of which he has directed. If a gift of a sum of money were given to a clergyman with directions to distribute it among the most worthy and needy of his flock, no one, it is presumed, would doubt that the power to select the objects of such beneficence was intended to be lodged in him who was to dispense the fund. In this example, as well as in these testamentary gifts, inasmuch as the power to select is an indispensable preliminary to the power to dispense, the natural and reasonable inference arises that when the latter is expressly given the former is impliedly given. As far as I have noticed, this has been, except in the case of *White v. Fisk*, the judicial deduction from similar premises.

In the case of *Trustees of the Philadelphia Baptist Association v. Hart's Executor*, 4 Wheat. 1, Chief-Justice Marshall appears to have had no doubt on this subject. The words of the will in that case were:

"What remains of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that for ordinary meets at Philadelphia, which I allow to be a perpetual fund for the education of youths in the Baptist denomination who shall appear promising for the ministry, always giving preference to the descendants of my father's family."

It is observable that here is no express authority to the designated association to make a selection of the beneficiaries entitled to take under this bequest, and yet the chief-justice drew the inference, apparently without the least hesitation, that such was

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the province of that body. The court in this case decided on grounds that have been much shaken, but with which at present we have no concern, that the association that was constituted the trustee being unincorporated could not stand in such capacity, and consequently the question whether the beneficiaries were, in the absence of such officers, sufficiently indicated, became important, and upon that subject the court said: "This question will not admit of discussion. Those for whose ultimate benefit the legacy was intended are *to be designated and selected* by the trustees. It could not be intended for the education of all the youths of the Baptist denomination who were designed for the ministry, nor for those who were the descendants of the father, unless, *in the opinion of the trustees*, they should appear promising. These trustees being incapable of executing the trust, or even of taking it on themselves, *the selection* can never be made nor the *persons designated* who might take beneficially." In this case it will be observed that the fund was given to the association, without any expressed direction for it to distribute such fund or to select the beneficiaries, and yet, looking to the evident intention of the testator, both such powers were unhesitatingly gathered by intendment. To the same purport, and equally strong on the point, was the action of Lord Redesdale, in the case of *Mahon v. Savage*, 1 Sch. & Lef. 111, in which the bequest was of £1,000, with the following directions:

"To be distributed amongst his poor relations, or such other objects of charity as should be mentioned in his private instructions to his executors."

There were no such private instructions left by the testator, and there were over fifty poor relations. The chancellor, after remarking that the bequest was a charitable one, and that the objects meant were the testator's own relations, added: "Here the testator's design was to give them as objects of charity, and not merely as relations, and I take it, the executors have a discretionary power of distribution, and need not include all the testator's poor relations."

Here, again, there was nothing in the will from which the

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testator's intention to confer upon his executors the authority to select the beneficiaries except the authority given to them to distribute the fund, and yet this eminent judge thought that such intention was clear as a plain inference. These two cases put the matter, in my opinion, on a legal basis. The principle adopted by these great judges, if applied to the case now before the court, must obviously lead to an affirmance of the decree appealed from; for if we assume, as was done in the decisions just referred to, that the power to employ this charity involves the power of selecting the beneficiaries, the case is divested of every element of uncertainty. In view of the recognition of such an hypothesis, the case will then present these simple characteristics: A bequest in trust to a charitable use, for distribution among a class of undesignated persons, with a power in the trustees to designate such persons. It is presumed that in such a posture of things no one will assert that the bequest is not to be sustained. The decree should be affirmed.

Decree unanimously affirmed.

CHESTER et al., complainants and appellants,

v.

JOHN HALLIARD et al., respondents.

1. Several depositors in a savings bank cannot join in a bill against the directors, on the ground that they were severally induced by the false publications of such directors to put their money in such institution, the same proving to be insolvent, such cause of complaint not being joint.

2. Nor can such depositors proceed in their own right, without making the corporation a party, to call the directors to account for the loss of the capital of the bank by the neglects and misconduct of such officers, such bank being the person primarily injured by such cause.

On appeal from a decree of the chancellor, whose opinion is reported in *Chester v. Halliard*, 7 Stew. Eq. 341.

Chester v. Halliard.

Mr. John Linn, for appellants.

Mr. C. L. Corbin, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

The complainants are twenty-four of the depositors of the Mechanics and Laborers Savings Bank of Jersey City, and they have filed their bill against certain of the managers of that institution, in behalf of themselves and of such other depositors as may choose to join themselves to the litigation. The end sought in the proceeding is to compel the defendants to make good the loss which they allege they have sustained by reason of having entrusted their money to the bank in question. This bill has been demurred to, and the issue thus raised having been found by the chancellor in favor of the defendants, is presented by this appeal to this court for its decision.

The complainants lay in their bill two entirely distinct grounds of complaint against the defendants. The first of these is that the defendants, in order to induce the complainants to believe "that said savings bank was a perfectly safe institution in which to deposit their savings, and that all moneys deposited with said bank were invested securely and employed to the best advantage for the interest of the depositors, gave out and published in the newspapers circulating in Jersey City and elsewhere, that the said bank was enabled from its net earnings and profits from time to time to declare annual dividends in favor of each depositor of six per cent. upon the amount of such deposits." It is then averred in the bill that this published statement was false, to the knowledge of the defendants.

The bill in this aspect is very plainly multifarious, on the ground of the misjoinder of these complainants. Looking upon these statements as true, the defendants have practiced a several deceit on the parties thus complaining. The injurious act of the defendants was joint, but it operated on each of the complainants

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as an individual, standing alone and out of all connection with his fellows. Each depositor was separately deceived. As actors in the suit, each would be obliged to prove a distinct wrong done to himself; some, by the proofs, might sustain their case, while at the same time others might fail to do so. As these parties, therefore, have no common interest, they cannot, according to rudimentary principles, be joined as parties to the proceeding. Any of the text-books will furnish the ordinary rule forbidding such a misjoinder, and the decision in *Jones v. Garcia Del Rio*, 1 T. & R. 297, is directly in point. In that case some of the holders of scrip or shares of a loan which was to be secured by bonds of the Peruvian government, filed a bill in behalf of themselves and others against the defendants as the agents of such government on the ground of the alleged misrepresentations and fraud of such agents in obtaining such subscriptions. The prayer of the bill was to have the moneys thus paid returned. But Lord Eldon, on a motion to dissolve an injunction which had issued on an *ex parte* application, declared "that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip, and as they were unable to do that, they could not, having three distinct demands, file one bill."

If the defendants have severally, as they say, been induced, by the fraudulent statements and practices of the defendants, to part with their money and put it in the keeping of an insolvent institution, it may well be that they each have a solid ground for an action at law or a bill in equity against such wrongdoers, but they cannot pursue a joint mode of redress for such separate injuries. With respect to this head the bill was rightly demurred to.

The second ground of complaint stated in the bill is deficient not in form, but in substance. It consists in statements showing that the defendants, as directors of the funds of the bank so mismanaged its affairs that it became insolvent. The bank itself is not a party to the suit, and the consequence is the complainants have no standing in court on this part of their case. If the capital and

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assets of the corporation have been squandered and lost by the misconduct of its officers, it is the corporate body itself that primarily has been wronged, and reparation is due immediately to it and not to the depositors. The depositors are but creditors of the corporation, and the moneys in question are not their moneys. It is true that as the directors are alleged to be the delinquent parties who are sought to be charged with the liability to make good the losses in question, these depositors have a footing in court to such redress in this matter, but in such proceeding the corporation, or in case of its insolvency, its receiver, must be a party, for it is in right of such corporate body that such a course of law is alone to be vindicated. But I shall not further discuss this subject, for the decisions are uniformly opposed to the legal power of a member of the corporate body to bring a suit in his own right and in disconnection with the company, for losses occasioned to the corporation by the misconduct of its officers, and the topic has so recently undergone examination by the supreme court in the case of *Conley v. Halsey*, 15 Vr. 111, decided at the last term of that court. This suit cannot be sustained against these defendants on this second ground, the same being thus essentially defective.

It is also to be remarked that even if this latter cause of complaint were complete and in itself made an equitable claim against these defendants, thereby the bill would have been rendered multifarious by reason of its resting on two entirely distinct matters of complaint. The alleged cheat of the defendants in inducing the complainants to put their money in an insolvent bank has no connection with the question whether the defendants by their misdoing occasioned such insolvency.

In any view that can be taken of the bill it is clearly multifarious, and consequently the decree must be affirmed.

Decree unanimously affirmed.

COX v. ROOME.

IDA P. COX et al., appellants,

v.

BENJAMIN ROOME, respondent.

Where, on petition, heirs-at-law claim a fund in court, on the ground that it is to be treated as real estate, the administrator of the ancestor through whom such heirs claim, is a necessary party to the procedure.

On appeal from a decree advised by Vice-Chancellor Bird, whose opinion is reported in *Jacobus v. Jacobus*, 9 Stew. Eq. 248.

Mr. C. G. Garrison, for appellants.

Messrs. C. & R. W. Parker, for respondent.

The opinion of the court was delivered by

BEASLEY, C. J.

It appears in this case that on a rule made on a bill for partition, a fund of money was left, by the order of the chancellor, in the hands of an executor, to secure the support of a relative of the testator, who was the original owner of the property, and who, by his will, had charged the lands sought to be divided, with such support. This life-interest having run out by the death of such legatee, the executor filed a petition in the partition suit for an order to distribute the fund in his hands, and such order was granted on an *ex parte* hearing. It subsequently appeared that one of the tenants in common, who was entitled to a distributive share of such fund, was dead, as is alleged, at the time such petition for the order of distribution was filed. A petition was thereupon exhibited by the heirs-at-law of such distributee, praying that such decree of distribution, *quoad* such deceased distributee, should be vacated, and that the money might be ordered to be paid to them as heirs-at-law. The contention of these petitioners is that the fund in question, being the proceeds of land converted into money for the uses of the partition proceeding, was to be regarded and treated as realty, and that it had become vested in

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them as heirs, and could not pass as money to the administrator of the original tenant in common.

In accordance with the advice of his Honor Vice-Chancellor Bird, this latter petition was dismissed, and from that order this appeal has been taken.

But the result attained in the court of chancery was obviously correct. The administrator of the deceased tenant in common was not made a party to these proceedings, and such official was plainly a party necessary to the consideration and decision of the question whether the fund referred to was to come into his hands or was to be diverted into another channel. This personal representative is just as much interested in the inquiry whether this property in controversy is to be treated as realty or as personalty as the petitioners themselves are. If the petitioners should succeed in their struggle to get this fund, on the ground taken by them, the consequence will be that the administrator will be deprived of moneys that would otherwise come to his possession to be administered by him according to law. Such a litigation cannot be settled in the absence of the administrator.

Let the decree be affirmed.

Decree unanimously affirmed.

RICHARD P. TERHUNE, appellant,

v.

THE MIDLAND RAILROAD COMPANY OF NEW JERSEY
respondent.

1. The cases in this court which hold that, on an appeal from an order refusing a preliminary injunction, the case must be heard, on the appeal, on the same facts that were before the court of chancery, do not deprive this court, on the hearing of the appeal, of the right to exercise that discretion upon which the allowance or refusal of an injunction rests.

2. This court, notwithstanding the fact that the act sought to be enjoined by a preliminary injunction may have been accomplished, may hear and adjudge the right on which a preliminary injunction should have been granted, or, in its discretion, leave the decision of such matters until final hearing.

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On appeal from an order of the court of chancery, discharging a rule to show cause why a preliminary injunction should not issue.

Mr. J. A. McCreery, for appellant.

Mr. J. W. Taylor, for respondent.

The opinion of the court was delivered by

DEPUE, J.

In *Morgan v. Rose*, 7 C. E. Gr. 583, this court held that an appeal will lie from an order refusing a preliminary injunction; and in the earlier case of *N. J. Franklinite Co. v. Ames*, 1 Beas. 507, it was decided that a case must be heard on appeal on the same facts that were before the court of chancery when the matter was heard there. The rulings in these cases were reaffirmed and applied in this court in *Black v. Delaware and Raritan Canal Co.*, 9 C. E. Gr. 455.

This right of appeal from the denial of a preliminary injunction is not taken away by the fact that the act sought to be enjoined may possibly have been already accomplished, and in some respects, therefore, an order of reversal might be inefficacious. The court may, on such an appeal, hear and adjudge the right upon which a preliminary injunction should have been granted.

In *Trustees of Huntington v. Nicoll*, 3 Johns. 566, the appeal was from an order granting a temporary injunction enjoining the trial of an action at law at the next circuit. The injunction had expired by its own limitation, before the appeal was taken, and, there being no order of the chancellor in force on which a reversal could operate, the appeal was dismissed.

It is not necessary to decide, at this time, whether, if it be admitted by counsel that occasion for a preliminary injunction has passed, the court may not, in its discretion, accept and act upon such an admission.

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But the decisions of the court above referred to do not deprive this court, in the hearing of appeals of this class, of the right to exercise that discretion upon which the allowance or refusal of a preliminary injunction rests.

The appellant is the owner of five shares of the capital stock of the Midland Railroad Company, and of its income bonds, of the par value of \$64,554; and of its scrip to the value of \$50. He filed his bill to enjoin the proposed consolidation of the company with other corporations under and by virtue of an act entitled "An act to authorize railroad companies incorporated under the laws of this and adjoining states, to merge and consolidate their corporate franchises and other property," approved March 25th, 1881. *P. L. of 1881 p. 222.*

Section 8 of the act provides for compensation to the stockholders of the consolidating companies who shall refuse to convert their stock into the stock of the corporation formed by the consolidation; and the proviso contained in the fourth section preserves unimpaired all the rights of creditors and all liens upon the property of each of the said corporations.

The appellant contends that the act of 1881 is unconstitutional, in that adequate means for compensating dissentient stockholders are not provided by section 8; that the consent of two-thirds of the stockholders of the Midland Railroad Company to the consolidation was fraudulently obtained, and that the railroads so consolidated did not form a continuous line of railroad within the meaning of the act of 1881.

The application for a preliminary injunction was heard before the vice-chancellor, on bill, answer and affidavits; and the vice-chancellor, on the hearing, discharged the rule.

It is by no means clear that, upon the case made before the vice-chancellor, the complainant was entitled to a preliminary injunction; and we think that the consideration and decision of the questions in issue should be left until the final hearing.

The order appealed from should be affirmed.

Decree unanimously affirmed.

Cornell and Douglass v. Andrus.

PETER C. CORNELL and ANDREW E. DOUGLASS, trustees &c.,
appellants,

v.

JOHN E. ANDRUS, respondent.

On bill for specific performance of an agreement for the purchase and sale of land, where the defendant's refusal to perform is based on alleged defects in the complainants' title, full statement and proof of the title will be required.

On appeal from a decree of the chancellor, whose opinion is reported in *Cornell v. Andrews*, 8 Stew. Eq. 7.

Mr. Robert Gilchrist, for appellants.

Mr. C. H. Hartshorne, for respondent.

The opinion of the court was delivered by

SCUDDER, J.

The bill in this case was filed by the appellants for a specific performance by the respondent of an agreement in writing, dated September 17th, 1881, for the purchase and sale of a certain plot or parcel of land at Constable Point, in the city of Bayonne, county of Hudson, and state of New Jersey, particularly described therein, for the price of \$65,000. A deed was prepared and tendered November 1st, 1881, according to the terms of the agreement, but the respondent refused to accept the same, and pay and secure the purchase-money, because he was advised that the title of the appellants was not a legal title in fee simple.

The defect insisted on is that the appellants' title to the land was derived under a mortgage given by Thomas E. Davis and Anne, his wife, to "Joseph D. Beers, the president of the North American Trust and Banking Company," dated November 14th, 1838, to secure twelve bonds, to several obligors, amounting to the sum

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of \$170,000. This mortgage was foreclosed in the year 1843, and under the decree a sale was made to a remote grantor of the appellants in the same year (1843).

The defendant, in his answer, admits the material stating parts of the bill, but insists that the mortgage made by Thomas E. Davis and wife to Joseph D. Beers, the president of said The North American Trust and Banking Company, conveyed a life estate only to said Beers, and that, therefore, the title which passed by the subsequent decree of foreclosure and sale, and the sale founded upon said mortgage, was a life-estate only in said lands, and that the complainants have no other or greater estate in said lands.

The complainants charge in their bill of complaint that by an act of the legislature of the state of New York, entitled "An act to authorize the business of banking," and especially by the twenty-fourth section of said act, Joseph D. Beers, president of the North American Trust and Banking Co., was at the date of the above-named mortgage, under which they claim title, a corporation sole of the state of New York, and by the law of the state of New Jersey, took a fee simple by said mortgage without any further limitation of estate than is contained in the said mortgage to his successors and assigns. The case was heard before the chancellor, on the bill and answer, with no evidence but that of the law of New York authorizing the business of banking; and a specific performance of the agreement was denied because there was no certainty that the defendant would not be subject hereafter to litigation to test before other tribunals, in direct proceedings, the very question which the court was asked to decide in this suit; and because it could not be certain that he would not be embarrassed in disposing of the property to purchasers by the apparent defect of estate which he urges in his defence.

The only statement of title made in the bill is that the mortgage was assigned in writing under seal, December 15th, 1840, by Thomas Talmage, president of the North American Trust and Banking Co., the successor in office of Joseph D. Beers, to Thomas G. Talmage, Henry Yates and William Curtis Noyes,

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and a foreclosure suit was commenced by these assignees in our court of chancery against the Bergen Point Co., to whom Davis and wife had conveyed the mortgaged premises; and that such proceedings were thereupon had, that the premises were sold to satisfy the mortgage, to purchasers from whom the complainants, by many mesne conveyances, derive their title. This is followed by the paragraph:

“It is unnecessary to state said decree, foreclosure or said conveyance, inasmuch as there is no dispute between your orators and said Andrus as to said title, except upon the point stated above.”

There is no doubt that if these proceedings were in ordinary form, and all subsequent purchasers and encumbrancers were made parties to the bill, the title under the mortgage foreclosed would be perfected so that the purchaser would acquire the title of the mortgagee and also the title of the mortgagor as it stood at the time of the making of the mortgage, according to its terms. It is also manifest that in these proceedings the title of the mortgagee passed through the court, and may have been settled in such form that this court would feel it right to agree with the adjudication.

It is certainly important that this court, in deciding a question of such great importance to the many persons who have become interested in this title, not only by the conveyance of the lands involved in this controversy, but of other lands under the same title, should have before it a distinct statement and proof of the complainants' title as it may be found in the proceedings for foreclosure and the decree, sale and conveyance thereunder. This matter has not had, in the opinion of the respective counsel of the parties, the importance which has impressed itself on us, nor was the attention of the court below called particularly to it. We are not willing to cast doubt on this title to the detriment of many persons who are largely interested under it, or, on the other hand, to compel the defendant to complete this large purchase without having the opportunity afforded us of examining the complainants' title. In order that the judgment of this court may have the influence which it ought to have, and would doubtless have in quieting this title, if a specific performance should

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be decreed, it is essential that the complainants should make full proof of their title, and especially of the proceedings for foreclosure of the mortgage and sale under which they claim. A decree here should be based on such proof, and not on the admissions of counsel, which may not be satisfactory to others.

Without, therefore, intimating any opinion whether this title is doubtful or sufficiently certain to compel a specific performance of this agreement, it will be ordered, for want of sufficient proof of complainants' title, that the decree denying the complainants' relief on the bill and proofs be affirmed, without costs, and without prejudice to filing a new bill, or to an application to amend.

For affirmance—THE CHIEF-JUSTICE, DEPUE, DIXON, KNAPP, REED, SCUDDER, VAN SYCKEL, COLE, GREEN, KIRK, PATERSON, WHITAKER—12.

For reversal—PARKER—1.

ELIZABETH L. MORRIS, BENJAMIN D. P. MORRIS AND
JAMES M. GREEN, executors of Jacob W. Morris, deceased,
appellants,

v.

PETER WHITE, respondent.

1. If a judgment creditor have notice of the execution of a prior unregistered mortgage, it is of the same effect, as to him, as if it were registered.

2. Where there is no fraud shown, the fact that a judgment creditor knew that a mortgage was intended and being prepared, will not deprive him of the right which a creditor has to secure a just debt by greater vigilance and promptness.

3. Where the bill calls for an answer under oath, and it is given directly responsive to the bill, it is the ordinary rule that the burden is cast on the complainant to prove the charge in his bill by more than one witness, or by the evidence of one witness corroborated by facts or circumstances equivalent to another witness. But where the defendant does not rely on his answer

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alone, but offers himself as a witness, he may refute himself by his own evidence, and circumstances added may overcome the answer.

4. The doctrine of notice of an unrecorded mortgage giving priority of lien, is based on fraud.

5. When payment of prior mortgages on taking a new mortgage does not give the right of subrogation.

On appeal from a decree in chancery, advised by Vice-Chancellor Van Fleet.

Mr. C. Robbins, for appellant.

Mr. A. C. McLean, for respondent.

The opinion of the court was delivered by

SCUDDER, J.

The bill was filed by Peter White to foreclose a mortgage made by Ferdinand Morin and wife to the complainant, for \$7,500, dated October 11th, 1876, and recorded October 13th, 1876.

Jacob W. Morris recovered a judgment against Ferdinand Morin in the New Jersey supreme court, for \$1,004.50, real debt and costs, on October 11th, 1876. This judgment was entered on bond and warrant of attorney for confession of judgment, dated, executed and delivered on October 11th, 1876, the same day on which judgment was entered. Jacob W. Morris died after answer was filed, and the appellants, executors of his last will and testament, were substituted parties to the record. The decree settles the priorities of several judgment and mortgage creditors who were made parties to the suit, and directs the payment of Peter White's mortgage out of the proceeds of the sale of the mortgaged lands, before the judgment of Jacob W. Morris. The appellants appeal from this part of the decree, and this preference given to the Peter White mortgage over the Jacob W. Morris judgment is the only point in dispute on this appeal.

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It will be noticed that the mortgage and judgment are dated on the same day, October 11th, 1876. The mortgage was not registered until October 13th, 1876. On the record, therefore, the judgment was first entered, and is entitled to priority of payment as a lien on lands, unless some legal reason is shown for changing this order of priority. It is claimed, in behalf of the mortgage, that Jacob W. Morris, the judgment creditor, had actual notice of the execution and delivery of the mortgage before the entry of his judgment. If this be so, the mortgage must be preferred, for by the act concerning mortgages (*Rev. p. 706 § 22*), unregistered mortgages are only void and of no effect against a subsequent judgment creditor or *bona fide* purchaser, or mortgagee for a valuable consideration, *not having notice thereof*. If a judgment creditor have notice of a prior unregistered mortgage, it is of the same effect, as to him, as if it were registered. If, as in this case, it be registered subsequent to the entry of judgment, such registration will relate back to the time of its execution and delivery, of which the judgment creditor had notice. *Priest v. Rice, 1 Pick. 164; Jackson v. Van Valkenburgh, 8 Cow. 260; Jackson v. Winslow, 9 Cow. 13.*

There must be such actual notice, or fraud, to change the priority of the first registry under the statute. Where there is no fraud shown, the fact that the judgment creditor knew that a mortgage was intended and being prepared, will not deprive him of the right which a creditor has to secure a just debt by greater vigilance and promptness. *Cushing v. Hurd, 4 Pick. 252; Warden v. Adams, 15 Mass. 233.* After he knows of the execution of the mortgage, it is too late for him to begin his race of vigilance. No point is made in this case against the honesty of the debt secured by the judgment, and both the mortgage and judgment may therefore stand together as liens on the lands of Morin, leaving the question of priority alone to be settled between them.

The bill of foreclosure states and charges that Jacob W. Morris's judgment, by which he claims to have some lien on the mortgaged premises, was obtained with full knowledge of the complainant's mortgage; and if a lien at all, is subsequent to the

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mortgage. It also calls for an answer under oath. This charge is met in the defendant's answer by an explicit denial of such notice. This answer being directly responsive to the bill, under the call made therefor, by oath, the burden is cast on the complainant to disprove it; or, rather, to prove his allegation of notice by more than one witness, or by the evidence of one witness corroborated by facts and circumstances equivalent to another witness. This is the ordinary rule. *Stearns v. Stearns*, 8 C. E. Gr. 167.

The vice-chancellor has found this measure of evidence in the case, and has advised the decree that the judgment of Jacob W. Morris is subsequent to the mortgage of Peter White, the complainant, as the same was obtained by confession after the said Jacob W. Morris knew that the complainant's mortgage had been made and executed, and before it was recorded, with the fraudulent intent and purpose to make it an encumbrance upon the same mortgaged premises prior to that of the complainant's "said mortgage, and to the prejudice of the complainant."

The evidence is that on October 11th, 1876, the day when the judgment-bond was executed by Morin to Morris, both of these parties were at Freehold; that Peter White was also there at the office of his attorney, who prepared the mortgage, and received \$7,500 from him, part of which was to be applied to satisfy three prior mortgages amounting to \$7,000 of principal, besides interest. On that day the mortgage was executed and delivered by Morin. The exact time of the execution does not appear. Morin is dead; Peter White is a very aged man, and does not give the exact time, nor does the attorney appear to remember it. But Jacob W. Morris, who was examined in his own behalf, says, on cross-examination, that "Mr. Morin was here [at Freehold] on that day [October 11th, 1876], and executed a mortgage to Mr. White; I recollect that very distinctly." He also says that his bond was executed, to the best of his knowledge, between ten and twelve o'clock in the forenoon, and further says that he understood that his judgment was ahead of the mortgage executed by Mr. White; but he does not say how or why he thus understood. The bond having been executed between ten and twelve

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o'clock in the forenoon, it was necessary, before it could have the effect of a judgment, that judgment shall be ordered to be entered thereon, and that the copy of the bond and warrant of attorney, with the entry of the judgment, signed by the justice, judge, or commissioner, should be delivered to the clerk of the court in which said judgment was to be entered; the clerk must file the same in his office, mark the time of filing, and enter the judgment in the minutes of the court. This all takes time; the parties were at Freehold, and the clerk of the court at Trenton.

The printed book does not show the time when the papers were filed and the minute of judgment entered in the supreme court. It was right for the defendant, after admitting that he knew that Mr. Morin was in Freehold on that day and executed a mortgage to Mr. White, and that he recollected that day distinctly, to offer some positive proof, or at least make the express declaration, that this knowledge was not obtained by him until after the entry of his judgment. Instead of this, he seeks to avoid the effect of this admission by the indefinite and equivocal expression in his re-examination that he understood his judgment was ahead of the mortgage executed to Mr. White. But there are other facts which made this evidence more suspicious. He knew that the complainant was about to make a loan of \$7,500 to Morin, on mortgage, for, about one week before the execution of the mortgage, Peter White went to Long Branch to look at Morin's property. Jacob W. Morris went with him to examine it, and recommended it to him to be a very good security for that amount of money; he estimated the property to be worth double the money White was to loan to Morin, and said if the buildings were off, the property would still be worth the money he was to loan. White says in this connection, "I told Jacob W. Morris I would let Morin have that amount of money," to wit, \$7,500. Morris knew this was intended to be a first encumbrance on the property, and that it was to be used for the payment of three preceding mortgages, which the records then showed to be the only encumbrances, amounting to \$7,000. He induced the loan by advising White; knew that the mortgage was executed October 11th, 1876, on the day he was in Freehold

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having his judgment-bond drawn, and the preparations for entering a judgment thereon; and on the next day, October 12th, 1876, he received from the attorney of Mr. White, at Freehold, \$3,076.93, in payment of a prior mortgage on Morin's property, which was held by his son, Benjamin P. Morris, and at the time knew it was paid out of the money received from Peter White as part consideration of Morin's mortgage to him. I think it was a fair inference from this evidence that he knew the mortgage from Morin to White was executed before the actual entering of his judgment in the supreme court. That the evidence was competent and sufficient to meet and overcome the denial of notice in his answer, I think was rightly adjudged. Where the defendant does not rely on his answer alone, but offers himself as a witness, the rule that one witness is not sufficient to overcome a responsive answer to a material fact, under oath, is hardly applicable. An answer may carry its refutation within itself. *Brown v. Bulkley*, 1 McCart. 294; *Dunham v. Gates*, 1 Hoff. Ch. 185; and the defendant may refute himself by his own evidence. There may also be evidence arising from circumstances stronger than the testimony of any single witness. *Clark v. Van Riemsdyk*, 9 Cranch 153.

The rule applies where the reason for it is found. The reason for the adoption of this rule by courts of equity is because, there being a single deposition only against the oath of the defendant in his answer, the denial of facts in the answer is equally strong with the affirmation of them by the deposition. 2 *Dan. Ch. Pr.* 985; or as it is stated in *Gresley's Eq. Ev.* 4, this rule has been referred to the equitable principle on which it is grounded, namely, the equal right to credit which a defendant may claim when his oath, positively, clearly and precisely given, and consequently subjecting him to the penalty of perjury, is opposed to the oath of a single witness. But when the witness who opposes the answer is the defendant himself, the reason of the rule fails. The court was therefore free to draw the inference that the judgment was obtained by confession after Morris knew that the complainant's mortgage had been made and executed, and before it was recorded, from his own testimony and attending circum-

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stances. It is not necessary to go further and say whether there was actual fraud, under the facts, in the purpose to make the defendant's judgment a prior encumbrance on the mortgaged premises, or whether the charge of fraud should be in this case clearly and explicitly charged in the bill. The charge is made that the defendant had notice of the complainant's mortgage, and that it is a prior encumbrance. The doctrine of notice, it is said, as affecting the priority of encumbrances, arises from the equitable view that it is fraud in one who has notice of an adverse claim in another to attempt to acquire a title to the prejudice of the interest of which he has been made aware. *1 Jones on Mort.* § 578. Further than this it is not necessary to go to justify the form of the decree in this case.

There is no right of subrogation to the liens of the three prior mortgages which the complainant paid and discharged from the record at the time he took his mortgage. He expressly refused to take an assignment of these mortgages, and voluntarily paid and discharged them from the record because he preferred to have the one mortgage to himself securing the total amount loaned by him to Morin. The doctrine of subrogation is not applied to the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own. *Sheldon on Subrog.* § 240, and cases in notes.

The decree will be affirmed, with costs.

Decree unanimously affirmed.

Boylan v. Kelly.

JAMES B. BOYLAN, JR., appellant,

v.

EUGENE KELLY, respondent.

JAMES MCKENNEY, appellant,

v.

EUGENE KELLY, respondent.

1. The act of April 21st, 1876, exempting mortgages by corporations embracing chattels from the requirement of the chattel mortgage act, is prospective only.

2. Under the first section of the act concerning the sale of railroads, canals &c., a purchaser of railroad property and franchises at a judicial sale is empowered to take and hold the purchase in a corporate capacity; and when so held it is liable to be seized and sold for corporation debts only.

3. The title of the purchaser of chattels at a sheriff's sale is not affected by mere irregularities of the sheriff in making the levy or advertising the sale.

4. Sale of goods not at the time in the presence, or within easy access of bidders, or selling *en masse*, instead of in detail, chattels which may properly be separated, are grounds for setting aside such sale at the instance of interested parties.

On appeal from a decree of the chancellor, whose opinion is reported in *Kelly v. Boylan*, 5 Stew. Eq. 581.

Messrs. C. & R. Wayne Parker, for appellant.

Mr. John W. Taylor, for respondent.

The opinion of the court was delivered by

KNAPP, J.

These appeals present a controversy between rival claimants to certain chattels formerly belonging to the Newark and South Orange Horse Railroad Company.

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The respondent was complainant in a suit to foreclose a mortgage made to him by James B. Boylan and wife, December 22d, 1874, upon the road, franchises and rolling stock of the said horse railroad company, which complainant had purchased at a foreclosure sale, and had sold to James B. Boylan, the mortgagor, taking the mortgage in suit to secure part of the purchase-money. The appellants were made defendants because they each claimed this personalty by purchase at sheriff's sale. Separate answers were filed. The defendant, Boylan, claimed by purchase under ten executions out of the supreme court and four out of the Essex circuit upon judgments recovered on and after May 3d, 1876, against James B. Boylan. McKenney derived his title by purchase from Wilkinson, Gaddis & Co., who purchased the property at sheriff's sale under an execution issued on their own judgment against the Newark and South Orange Horse Railroad Company, which company, he avers, got title either at the time or after its conveyance to the mortgagor.

Each appellant, in asserting his right to the property, denied the complainant's title as against the judgment creditors under whom they respectively claimed, on the ground that complainant had failed to refile his mortgage, as required by the act respecting chattel mortgages. The real estate under the mortgage has been disposed of, and the personal property has been sold by order of the chancellor, and the proceeds are held in that court for distribution.

A purchaser of chattels at a legally valid sheriff's sale acquires all the title to the property which the defendant in execution had in it, if it be property liable to execution. And it is the law that mere irregularities of the sheriff in levying and advertising goods under an execution cannot affect the title of a purchaser, as he is not required to look into the correctness of such proceedings, but may rely upon the force of the judgment and execution. *Freeman on Ex.* § 339.

The forty-first section of the mortgage act (*Rev. p. 709*) declares that every chattel mortgage filed in pursuance of the act, "shall cease to be valid as against the creditors of the person making the same, or against purchasers and mortgagees in good

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faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of said term of one year, a true copy of such mortgage, with a statement exhibiting the interest of the mortgagee in the property therein claimed by him by virtue thereof, shall be again filed in the office of the clerk or register."

The complainant below never refiled his mortgage, so that under the provisions of that section, although the mortgage remained good as between the parties until actually satisfied, from and after the expiration of a year from the date of its original filing it lost its lien upon the mortgaged property as against all then present or subsequent creditors of the mortgagor, whether judgment creditors or creditors at large. The terms of the act descriptive of those creditors against whom the neglected mortgage shall lose effect, are wide and comprehensive. Judgment creditors may make immediate seizure; and general creditors, on recovering judgment against the owner, may acquire a lien superior to that of the mortgagee.

If, then, either defendant acquired title under a judgment having such superiority of lien, the decree below, holding the complainant entitled to the property through his mortgage, was erroneous.

But the decree maintaining the mortgagee's title was not rested upon the provisions of the section referred to. It was in reliance upon the act of April 21st, 1876 (*Rev. p. 92 § 4*), passed after the year within which the mortgage was required by the section above referred to, to be refiled, and before the recovery of either of the judgments under which the appellants claim to have purchased. The act of 1876 provides "that nothing in any of the laws of this state shall be held to require the filing of record in the clerk's office of any county of any mortgage given by any such corporation conveying the franchises thereof, whereby, also, any chattels then or thereafter to be possessed and acquired by such corporation shall purport to be mortgaged; provided, that such mortgage shall be duly lodged for registry, according to the laws regulating the conveyance of real estate." Among the corporations referred to in this section are embraced those created

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by law upon the purchase of corporate property and franchises under judicial sales thereof.

The chancellor held that the mortgage of the complainant was a corporation mortgage within the meaning of the act referred to, and that the effect of its provisions was to restore the rights which the mortgagee had lost by not refiling his mortgage, and to continue the lien against all creditors who had not acquired, through due process, vested rights in the property. Before this act passed, the mortgagee had lost his lien as against creditors, under then existing laws. It did not provide for the restoration of abandoned encumbrances, and the decree below could only have been made through a construction giving to the statute retrospective effect.

Assuming this mortgage, given as it was by James B. Boylan and wife, to be embraced within the spirit and meaning of the act as a corporation mortgage, the question presented is, whether anything found in the language of the statute justifies us, under settled rules of statutory construction, in giving to it retroactive force. It does not suffice for that result that the act does not exclude the past from its operation. The general rule is that all statutes shall have prospective effect only. *Berdan v. Van Riper*, 1 Harr. 7; *Morris Aqueduct Co. ads. Jones*, 7 Vr. 206; *City of Elizabeth v. Hill*, 10 Vr. 556; *United States v. Heth*, 3 Cranch 399; *Williamson v. N. J. S. R. R. Co.*, 2 Stew. Eq. 311.

In *United States v. Heth*, Judge Patterson says: "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or the intention of the legislature cannot otherwise be satisfied." This language was cited with approval by Mr. Justice Depue, speaking for this court in *Williamson v. New Jersey Southern R. R. Co.*, *supra*, in which case the act here in question was directly under consideration, and to it these rules were applied. And it was distinctly held that the act did not necessarily require a retrospective construction, and therefore should not receive it. True it is that then the creditors sought to be affected by it had, before the passage of the act, acquired a lien by levy upon the chattels, and this circumstance called forth

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the further expression "that if the language required another interpretation it could not, on constitutional grounds, disturb rights already vested. But in both these aspects the legislation was viewed, and the construction given was designed to be authoritative, and its construction must here be considered settled, not only on principle but authority.

The case, however, is not disposed of by this conclusion. The claims of the defendants require consideration. They cannot both have title to the property, if either has. It must have been the individual property of Boylan to subject it to seizure under the fourteen judgments, while Wilkinson, Gaddis & Co. purchased it as belonging to the Newark and South Orange Horse Railroad Company.

To determine which class of judgments acquired a lien, it is necessary to see in what character the property was held at the time the levies were made; whether James B. Boylan was the owner or whether it belonged to the railroad company organized by himself and others after his purchase. The first section of the act concerning the sale of railroads, canals &c., passed in 1875 (*Rev. p. 945*), was authority to him as a purchaser of railroad property and franchises, or as one for whose account such purchase was made, to organize a corporation and to take and hold in that capacity the property and corporate franchises.

The chancellor, following the case of *Commonwealth v. Central Passenger R. R. Co.*, 52 Pa. St. 506, considered the act of purchase by Boylan as creating him a corporation under the statute. The act certainly does confer upon such purchaser the right, at his election, to take and hold and exercise such property and franchises in a corporate capacity, to the full measure in which they were enjoyed by the corporation sold out, with power to organize for its management in the usual mode of controlling such interests. The purchaser, Boylan, left it in no doubt as to the character in which his purchase was designed to be held; for he proceeded in due time to effect a corporate organization, adopting the name of the old company. In doing so the directions of the act were not strictly observed, but sufficiently so to stand against any mere collateral attack. It sufficiently evinced

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his purpose to receive and hold the property and rights in a corporate relation, and not as a natural person. Having so determined, the title to it devolved upon the new corporation, and it remained there when seized under the several executions. It was not, therefore, subject to seizure and sale under executions against James B. Boylan; and the appellant, James B. Boylan, Jr., took nothing by his purchase. The judgment of Wilkinson Gaddis & Co. was against the corporation; and the sale under their execution, if legally made, vested the title in the plaintiff in execution; and the appellant, McKenney, acquired it by direct conveyance from them.

But the validity of the sheriff's sale is attacked. It is claimed to be fraudulent and void, so as to give no title to purchasers.

Mere irregularities in the levy and advertisement of chattels, which a purchaser may not know, and of which he is not bound to inquire, cannot of themselves, in the absence of collusion, affect his title. *Freeman on Ex.* § 286.

The objections here are not confined to irregularities. The sale was made when the goods were neither present nor within easy access of bidders. The entire property was sold in mass, and for a nominal sum. These points the complainant below is entitled to press; for while it is true that the title of purchasers at a judicial sale cannot be attacked collaterally, unless the sale be so clearly void as to convey no title, the rule creates no impediment to the complainant's attack. He, as a claimant to the chattels, is here in a position to make it. *Cummins v. Little*, 1 C. E. Gr. 48.

Each of these objections has been made the occasion for setting aside sales on execution. And in some of our sister states the rule is adopted holding sales under such circumstances absolutely void, conveying no title to the purchaser. *Klopp v. Witmoyer*, 43 Pa. St. 219; *Bennett's Branch Co. Appeal*, 65 Pa. St. 242; *Linnendoll v. Terhune*, 14 Johns. 222; *Sheldon v. Soper*, 14 Johns. 352; *Cresson v. Stoul*, 17 Johns. 116; *Hermann on Ex.* §§ 216, 217.

Sales of goods which cannot be seen or examined by bidders or at once delivered to purchasers, must, as a rule, result in a sacrifice of the interests of defendants and creditors. Sales made

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by massing quantities of goods and of different sorts, must be attended with like results. Both practices must antagonize any policy for the protection of general creditors of the debtor against fraudulent sales under the forms of law. If a sheriff may, at his discretion, so conduct sales, general creditors are obviously put at the mercy of the debtor and a single creditor. Such sales are violative of well-recognized rules controlling the conduct of official sales; but as circumstances may, and sometimes do, make exceptional cases, the error of the adjudications referred to is in holding sales obnoxious to these objections as absolutely void.

If void, no title passes to the purchaser; and as title rises no higher than its source, innocent purchasers could be in no better condition; while, in fact, the courts protect innocent purchasers. The true rule is that the sales are voidable only by direct application, within reasonable time, to the court whose process has been misused; or, in equity, by those entitled to make the contest.

Inadequacy of consideration is not, in itself, ground for disturbing sales of land or goods, except where it is so gross as to "shock the conscience," but united with other circumstances detrimental to defendants in execution or creditors, so that in the regard of courts they unitedly show constructive fraud, sales have been annulled. *Cummins v. Little, supra*; *Freeman on Ex.* § 309.

The sale here considered has nothing to support it but naked form. The advertisements were not put up in the proper township. The subject of sale was miles away; not a dollar's worth within the observation or easy reach of any who might have seen the sheriff's notices; horse railroad cars, horses, harness and snow-plows massed together and sold at a single bid. The complainant had no notice of the sale; nor did he acquire knowledge of it until long afterwards. It could surprise no one that plaintiffs in execution bought it all for one dollar. Nothing but a decent discretion in the bidder suggests the offer of a larger sum. Such a sale, in my judgment, ought not to stand before any tribunal clothed with power to put it out of the way, save in the protection of subsequent *bona fide* purchasers or encumbrancers. If it could challenge countenance or support, creditors outside would have little protection.

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Setting the sale aside, however, would not give the goods to complainant. The lien of the execution would remain notwithstanding the sheriff's faulty proceeding. Complainant's relief would be to have a resale, and a right to the surplus after paying the judgment creditor. The court of chancery, through its receiver, has assumed control of, and has already sold, the property; and the proceeds are in court as its representative. It will be entirely proper now to dispose of the fund as the result of a resale ordered. The right of the plaintiffs in execution then would be to be paid their judgment. This they have received as the consideration for the transfer of the entire purchase to McKenney, who took it in good faith and for value, and is entitled to just protection. But the evidence shows that he took only as a mortgagee. The transaction was this: McKenney became purchaser under an arrangement with one John Boylan and the judgment creditors, by which McKenney was to advance to said Boylan \$10,000, and take the property as security for repayment to him, and Boylan was to pay the judgment. Out of this advance Boylan paid the judgment, and subsequently repaid to McKenney \$5,500, leaving a balance due McKenney of \$4,500, which sum, he testifies, is the amount of his unsatisfied claim. He will, therefore, be indemnified by the receipt of that sum, with interest. Whatever of this fund creditors or encumbrancers under superior liens are not entitled to, falls to the mortgagee under his mortgage.

The chancellor recognized a right above all other parties to the suit in James B. Boylan, Jr., to ten horses sold by the receiver, and ordered a reference as to their value. From this part of the decree there is no appeal.

The appeal of James B. Boylan, Jr., should be dismissed, with costs.

The decree of the chancellor should be reversed, and the record remitted, with instruction to decree distribution of the fund as follows: After paying to James B. Boylan such sum as he may be found entitled to receive, then payment to the appellant McKenney, of the sum of \$4,500, with interest, together with his costs; and payment of the balance to the respondent, Eugene Kelly.

Decree unanimously reversed.

Crane v. City of Elizabeth.

JONATHAN H. CRANE, appellant,

v.

THE CITY OF ELIZABETH, respondent.

The charter of Elizabeth requires that in laying out and opening streets compensation must be made to the *owner or owners* of lands and real estate taken for the improvement.—*Held*, that this does not require compensation to be made to mortgagees specifically; that the compensation is to include the value of all the interests burdened by the public easement, and is to be paid to the *owner* of the land if no other claimant intervenes, and if, in any case, such owner ought not in equity to receive the whole, timely resort must be had to the court of chancery, which will see to the equitable distribution of the fund.

On appeal from a decree advised by *Hugh M. Gaston, Esq.*, advisory master.

Mr. Foster M. Voorhees, for appellant.

Mr. Frank Bergen, for respondent.

The opinion of the court was delivered by

DIXON, J.

The appellant is the holder of a mortgage on lands in the city of Elizabeth, given and duly recorded on June 1st, 1870. The city, in March, 1869, commenced proceedings, under its charter, for the laying out and opening of an avenue through these lands, in the course of which an award for the land taken was made to the mortgagor as owner in July, 1870, which award was paid to the mortgagor in April, 1871, and thereupon the avenue was opened. The appellant, seeking satisfaction of his mortgage, asks to have the land sold free from the easement of the public highway. No objection is urged against the municipal proceed-

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ings except that they did not result in making compensation to him for the interest which he as mortgagee had in the land taken; and the sole question for decision is whether, for want of such compensation, his lien remains unimpaired.

Our constitutional provision, that private property shall not be taken for public use without just compensation, is limited by the added clause that land may be taken for public highways as before, until the legislature shall direct compensation to be made. *N. J. Const. Art. I. ¶ 16.* The effect of this whole enactment has been adjudged by this court to be that all land required for streets, in any municipality of the state, may be taken for such uses upon making therefor the compensation fixed by the municipal charter, no matter whether it be just or unjust. *Simmons v. Passaic, 13 Vr. 619.*

Consequently, we are brought to the inquiry whether, by its charter, the city of Elizabeth is directed to make compensation to mortgagees of land, before their interests can be subjected to the easement of a public highway.

The ninety-second section of the charter (*P. L. of 1863 p. 109*) authorizes the city council to take and appropriate lands and real estate for the purposes of laying out and opening streets &c., upon making compensation to the owner or owners thereof, as thereafter mentioned and provided. The ninety-fifth section directs that whenever the council shall determine to lay out and open any street &c., and to take and appropriate for such purposes any land and real estate, they may treat with the owner or owners thereof for the same, and may purchase such lands and real estate from the owner or owners thereof, and make such compensation therefor as they shall judge reasonable; and thereupon shall receive from such owner or owners a conveyance of such lands and real estate to the city. The ninety-sixth section provides that, in case no agreement for such purchase can be made, the council may appoint commissioners to make an assessment of the damages that any such owner or owners will sustain by taking and appropriating the lands and real estate; and that, in estimating and assessing such damages, the commissioners

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shall have due regard both to the value of the lands and real estate and to the injury or benefit to the owner or owners thereof; and shall specially estimate and assess the value of the lands and real estate necessary to be taken. The ninety-eighth section directs the commissioners to give notice, by newspaper advertisement, of their first meeting, and to make a just and true estimate and assessment as aforesaid; which, being ratified by the council, shall be binding and conclusive upon the owner or owners of such lands and real estate. It also directs said commissioners to cause said lands to be converted and used for the purposes aforesaid; and provides that persons conceiving themselves aggrieved may appeal to the supreme court for a jury trial. The ninety-ninth section authorizes persons entitled to the award to sue for and recover the same in an action of debt. The one hundredth section directs the city treasurer to tender and pay to the owner or owners of such lands and real estate the amount of such estimate and assessment of damages due to him or them; but if such payment cannot be made, the council is to cause the same to be placed at interest, on good security, for the use of the person to whom it may be due, to be paid on demand to the person or persons entitled thereto.

These provisions clearly indicate two things: first, that the award for each parcel of land is to include the value of the land; and, second, that the award is, in the regular course of charter proceedings, to be paid to the class of persons designated as owners of the land. Under these circumstances, what persons are so described?

The term "owner," as applied to real estate, is undoubtedly one of variable meaning. Thus, in contracts of insurance, it has received much latitude of interpretation, so as to embrace persons entitled to particular estates and equitable interests, where such construction was necessary to preserve the validity of the policy, or prevent the forfeiture of rights under it. *May on Ins.* § 285. Likewise, in statutes providing compensation to owners for lands taken for public use, where the constitution required that special interests should be paid for,

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similar scope has also necessarily been given to the language, in order to render the acts consistent with the fundamental law. Thus, in *Ellis v. Welch*, 6 Mass. 246, and *Parks v. Boston*, 15 Pick. 198, it was held to include every person having a valuable vested interest in land, capable of being damnified by the laying out of a street, because a narrower construction would have infringed upon the constitution of the commonwealth. But in *Watson v. N. Y. Cent. R. R. Co.*, 47 N. Y. 157, where, upon the same principle, it was urged that the phrase "owners of land" should embrace judgment creditors of the legal owner, the court refused to construe it so broadly, because the remedies of such creditors against the land were supposed to be subject to legislative supersedure, by the power of eminent domain, without compensation. Whether this reason was sound in law need not be here considered; the case is cited merely to mark the limit of the ground upon which an extended signification of the word "owner" is adopted.

In the charter now under consideration no cause is found for going beyond the ordinary meaning of the language used. The act is equally valid, whether it be liberally or strictly interpreted, for the legislative will, as expressed in its provisions, is the final measure of the rights of persons concerned. Hence we are called upon to apply to this charter the primary rule that in statutes and contracts words are to be received in their common acceptation.

According to this acceptation, a mortgagee of land is not the owner, as has been frequently adjudged in this state. *Wade v. Miller*, 3 Vr. 296; *Shields v. Lozeau*, 5 Vr. 496, 503; *Kircher v. Schalk*, 10 Vr. 335.

In the possible complications of legal and equitable estates, and of estates in possession, remainder and reversion, it may sometimes be difficult to point out "the owner," but where, as in the present case, there is one who is a legal and equitable tenant in fee simple in possession, all doubt vanishes, unless there be some other dominant consideration controlling the judgment of the court.

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But it is said that this construction of the charter, even if constitutional, nevertheless results in great injustice, by giving to the "owner" the full value of the land which may really, in equity, belong to others. If this were true, it would certainly constitute an important element in determining the legislative will; for the courts presume that the legislature intends not only to keep within its constitutional boundaries, but also to protect every just claim, and, so far as the language of statutes permits, the courts will further these general purposes of legislation.

But we do not think that the apprehended danger actually exists. Under the charter, all interests will, with proper vigilance, receive a reasonable protection. The price to be paid by the city is to be the full value of all rights which may be impaired for the public benefit, and this is to be ascertained only after notice, not specially to individuals who alone may appear to guard their claims, but generally by the publicity which attends the doings of the council, and by newspaper advertisement, which may reach all alike, and under which all may be protected. The action of the city authorities has thus the distinctive qualities of a proceeding *in rem*, a taking, not of the rights of designated persons in the thing needed, but of the thing itself, with a general monition to all persons having claims in the thing. When, by the appraisement of the commissioners, the price of the thing is fixed, that price stands instead of the thing appropriated, and represents all interests acquired. The legislature has not imposed upon the city officials the duty of searching out all these interests and assigning to each its just equivalent. It has contented itself with the simple direction that the fund shall be paid to him who is presumably entitled to it, the general owner of the land. Where no other claimant intervenes, that course will usually meet the ends of justice. But if, in any special case, this owner ought not, in equity, to receive the fund, the court of chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute has left without express protection. *McIntyre v.*

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Easton and Amboy R. R. Co., 11 C. E. Gr. 425; *Wheeler v. Kirtland*, 12 C. E. Gr. 534; *Bright v. Platt*, 5 Stew. Eq. 362; *Astor v. Miller*, 2 Paige 68; S. C. (sub nom. *Astor v. Hoyt*), 5 Wend. 603.

In opposition to this view, it is suggested that under the ninety-fifth section, which requires the council to treat with the "owners" alone, before instituting condemnation proceedings, the city would be able to acquire or obliterate all lesser interests by private arrangement with such owners, and without giving the public notice, which is designed to put all parties on their guard. Such, however, is not the legitimate result. There is nothing in the charter which gives to the owner's conveyance to the city any greater effect than his deed to an individual would have, and if the corporation consents to take conveyance from him, it must see that he is possessed of all rights which are to be burdened by the public easement.

The construction thus placed upon the charter seems most consonant with what it might have been supposed the legislature would require, in conferring upon this public corporation the power of taking lands for highways. The state's power being untrammelled by any duty to make compensation, and yet it being just that compensation should be made, it was probable that some method of awarding satisfaction would be adopted which should not cause great inconvenience to the public, and still might afford substantial security to individuals. These seem to be the characteristics of the law as we interpret it. But if by the term "owner" were understood every person having any estate or lien in the land, then there would devolve upon the municipal authorities duties, for the performance of which no machinery is provided in the charter; and with the best machinery, the city officials would usually be unfitted. To impose such duties under this charter would set up a scheme of condemnation always difficult, sometimes impossible, to be executed, and likely to involve the city in frequent and expensive litigation.

Our conclusion is that the avenue was lawfully opened without making compensation directly to the mortgagee, and that the

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sale of the land on foreclosure of his mortgage will be subject to the public easement.

Let the decree below be affirmed.

MAGIE, J. (dissenting).

I cannot concur with the majority of the court upon this case.

The question involved requires the construction of section 96 of the charter of the city of Elizabeth, which provides for an award of damages to the "owner" of lands taken for public streets. When such an award is ratified, section 98 of the charter provides that the land may be converted to the public use.

Is a mortgagee of lands taken, an "owner," within the meaning of that section?

While the constitutional provision respecting the taking of property for public use does not, in our state, require compensation to be made for land taken for public streets, unless the legislature so direct, yet when the legislature does direct compensation it is in pursuance of the constitutional provision, and the legislative act gives the right to and fixes the standard of compensation. *Simmons v. Passaic*, 13 Vr. 619.

When a construction is to be given to a legislative act providing for compensation for lands taken for public streets, I cannot doubt that we are bound to presume that the legislature intended to act with justice. Any construction which would produce the injustice of compensating the owners of certain interests, to the exclusion of the owners of other interests, ought not to be adopted, unless the language is so clear as to permit no other result.

The word "owner" may be, and often is, used in a restricted sense, which will not include the holder of a limited or conditional estate. Such is not its necessary meaning. In determining in what sense it is here used, we ought to consider the whole act.

By section 95 of this charter, the city is authorized to treat with the owners of lands required for streets, to purchase such lands, to make compensation and to receive conveyances thereof.

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The compensation paid is to be included in the damages afterward required to be assessed on lands benefited.

There is no provision that such a conveyance should cut off and bar all limited and conditional interests in the land. The conclusion seems to me irresistible that such interests, if not purchased, would be preserved, and that the authority to purchase is broad enough to include such interests.

Now, section 96 provides for a condemnation by an assessment of the damages which any *such* owner will sustain. Such owner is the owner from whom a purchase may be made under section 95. The term, in my judgment, includes every person having an interest in the land, such as a mortgagee &c.

Did the award in this case include the mortgage interest?

The mortgagee was not named in the award. The compensation was awarded to James C. Blake, who was the owner of the equity of redemption.

Since notice to owners of a proceeding to award need only be by advertisement (section 98), that question does not arise.

But by the charter (section 99), the award is made the basis of a suit for the compensation. While the suit is given to the person "entitled to" damages, it is obvious the statute means "entitled to by reason of the award," for the award is made conclusive evidence. In this case it would conclude the mortgagee from claim, for the whole award is to Blake. The mortgagee would therefore have no claim to any part of the damages by an action at law.

I cannot believe that it was within the intention of the legislature to drive the mortgagee to a resort to equity to protect his rights. And I cannot believe it was designed to ignore his rights.

I think this justifies the conclusion that the true construction of the section in question requires that there should be an award to each person interested in the land. The doctrine of the case of *Bright v. Platt*, 5 Stew. Eq. 362, is not applicable.

That this construction will put the city to expense, trouble and risk in condemning land ought not to have weight in determining this question. The right of private property should be preserved by a construction that will prevent the risk of ac-

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quisition by the public of a right to land by paying the owner of the equity, which may be of mere nominal value, to the exclusion of the mortgagee, whose interest may include all the land is worth.

For affirmance—THE CHIEF-JUSTICE, DIXON, KNAPP, REED, SCUDDER, VAN SYCKEL, COLE, WHITAKER—8.

For reversal—MAGIE, KIRK, PATERSON—3.

LEVI G. IRWIN AND AARON E. JOHNSON, executors of Richard Corlies, deceased, et al., appellants,

v.

ELIZABETH E. JOHNSON, respondent.

1. Voluntary declarations by a creditor of an intention to release a debtor, unless accompanied by some act which amounts to a release at law, will not operate as an equitable release.

2. *Leddel v. Starr*, 5 C. E. Gr. 274, overruled.

On appeal from a decree advised by Vice-Chancellor Bird.

Richard Corlies died January 2d, 1879, leaving a will, of which Levi G. Irwin and Aaron E. Johnson were the executors.

At the time of the death of Mr. Corlies there were, in the possession of one Annie Jones (a grandchild who lived with him), two mortgages made to the deceased by the complainant, Elizabeth E. Johnson, who is his daughter.

These mortgages were placed in the hands of the executors as a part of the assets of the estate, in the shape of subsisting debts against Mrs. Johnson.

Subsequently Mrs. Johnson and her husband gave a promissory note to the executors, secured by a chattel mortgage, in pay-

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ment of one of the said mortgages, which mortgage was then canceled of record.

She files her bill in this suit, the prayer of which bill is that the subsisting mortgage may also be canceled; that the cancellation of the other mortgage, for which the note was given, may be confirmed, but that the note and chattel mortgage given for it may be canceled, and the executors enjoined from suing upon any of these instruments.

The facts which the complainant alleges to exist, and upon which she grounds her claim for relief, are, substantially, the following: that the testator informed the complainant that upon his decease the said mortgages should be hers; that he offered to deliver the mortgages to her, but that she being unable to pay the increased tax which would follow, refused to accept them; that the mortgages were delivered to Annie Jones for the purpose of delivering them, after his decease, to complainant.

Mr. John J. Ely, for appellant.

Mr. Chillion Robbins, for respondent.

The opinion of the court was delivered by

REED, J.

The complainant's counsel placed his claim for relief upon two grounds.

NOTE.—What endorsements on an obligation made by the obligee are sufficient to bar his representatives from enforcing it or not, in equity, *Aston v. Pye*, 5 Ves. 351, note; *Major v. Major*, 1 Drew. 165; *Antrobus v. Smith*, 18 Ves 39; *Trimmer v. Darby*, 25 L. J. (Ch.) 424; *Tiffany v. Clarke*, 6 Grant's Ch. 474; *Sherwood v. Smith*, 23 Conn. 520; *Otis v. Beckwith*, 49 Ill. 121; *Pennington v. Gittings*, 2 Gill & Johns. 208; *Bulkeley v. Noble*, 2 Pick. 337; *Meriwether v. Morrison*, 78 Ky. 572; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400; *Green v. Langdon*, 28 Mich. 221; *Ricketts v. Livingston*, 2 Johns. Cas. 97; see *Batton v. Allen*, 1 Hal. Ch. 99.

What accounts, letters and memoranda of a decedent are sufficient to discharge an obligation or not, or to procure equitable relief therefrom, *Eden v. Smyth*, 5 Ves. 341; *Morgan v. Malleson*, L. R. (10 Eq.) 475; *Scales v. Maude*, 6 De G. M. & G. 43; *Moore v. Darton*, 7 Eng. L. & Eq. 134; *Clark v. Warner*, 6 Conn. 354; *Hartwell v. Rice*, 1 Gray 587; *Ellis v. Secor*, 31 Mich. 185;

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First. A gift of these mortgages to Mrs. Johnson.

Second. An equitable release of them to her by the deceased during his lifetime.

The contention upon the first ground is that the delivery to Annie Jones of these mortgages, was a delivery to Mrs. Johnson with an intent to pass the property in the mortgages to the complainant. There is nothing in the case to support this contention. How these papers came into the hands of Annie Jones is only explained by her own testimony, and it is entirely inconsistent with the view that it was a transference of the dominion over the property from the testator to Mrs. Johnson.

She says that they were given her, with instructions by the testator to give them, upon his decease, to the persons who were to settle his business.

Outside of her testimony I find nothing which would (under the rules which guard the passage of property by gift) bring the present case into a semblance of a gift.

Nor did the vice-chancellor place the case upon that ground.

He put his conclusion entirely upon the doctrine of an equitable release. The rule adopted and which he was bound to recognize as the law, is laid down in the case of *Leddel's Exrs. v. Starr*, 5 C. E. Gr. 274. Chancellor Zabriskie, in this case, announced the rule in these words: "There is a series of decisions in courts

High's Appeal, 31 Pa. St. 283; *Loring v. Blake*, 106 Mass. 592; *Carpenter v. Soule*, 88 N. Y. 251; *Oller v. Bonebrake*, 65 Pa. St. 338; *Mallett v. Page*, 8 Ind. 364; *Jennings v. Blocker*, 25 Ala. 415; *Stallings v. Finch*, Id. 518; *Crawford v. McElroy*, 2 Speer 225.

An intentional destruction of the obligation amounts to a release of the debt, *Gilbert v. Wetherell*, 2 Sim. & Stu. 254; *Silvers ads. Reynolds*, 2 Harr. 275; *Darland v. Taylor*, 52 Iowa 503; *Gardner v. Gardner*, 22 Wend. 526; *Rees v. Rees*, 11 Rich. Eq. 86. A mere expression of an intention to destroy it is not enough, *Nelson v. Cartmel*, 6 Dana 7; *Campbell's Estate*, 7 Pa. St. 100; *Chew v. Chew*, 8 C. E. Gr. 471; see *Harley v. Harley*, 57 Md. 340.

A verbal gift of the arrears of an annuity cannot be recalled after the death of the obligor, *Long v. Long*, 17 Grant's Ch. 251; see *Johnson v. Johnson*, 22 La. Ann. 144. And so of a surrender of an obligation, with an intention to cancel or forgive the debt, *Hurst v. Beach*, 5 Madd. 351; *Vanderbeck v. Vanderbeck*, 3 Stew. Eq. 265; *Sherman v. Sherman*, 3 Ind. 337; *Edwards v. Campbell*, 23 Barb. 423; *Bridgers v. Hutchins*, 11 Ired. 68; *Lee v. Boak*, 11 Gratt. 182; and what acts amount to such surrender, *Ricketts v. Livingston*, 2 Johns.

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of equity in England and in this country which have established the principle that when a creditor has, by written or parol declarations with regard to a debt, or by conduct tantamount thereto, declared or agreed that a debt shall be relinquished or given up, or that it has been so relinquished or given up, a court of equity will consider this an equitable release, and will not permit his representatives to enforce it."

The rule so laid down was broad enough to cover a case where a person had announced his intention to discharge a debt.

If we assume that the facts in this case show that Mr. Corlies, in his lifetime, announced to Mrs. Johnson that upon his death these mortgages should be hers, and to others, that he intended to make her equal with his grandchildren by giving her the mortgages, I yet think the rule which controlled the court below is one which, before adoption by this court, should be the subject of careful scrutiny.

At law it is apparent that a parol declaration of the kind set out in this case would have no efficiency at all. A debt cannot be extinguished by a mere statement by the creditor that he does not intend to enforce it; or that he forgives it; or even by a receipt for the whole, when, in fact, a part only has been paid.

The recognition of a doctrine which permits a mortgage to be extinguished by a verbal declaration of the debtor that he did not intend to insist upon its payment, would seem to break down

Cas. 97; Dittoe v. Cluney, 22 Ohio St. 436; Melvin v. Bullard, 82 N. C. 33; Young v. Young, 80 N. Y. 422; Henderson v. Henderson, 21 Mo. 379; Shaw v. White, 28 Ala. 637.

The following declarations by deceased obligee, without any acts, were held insufficient to discharge the debt, or to prevent its enforcement in equity: that the obligor might do as he pleased with what he owed; that decedent should never ask him for it, or require him to pay it, *Reeves v. Brymer, 6 Ves. 516*; that the payee of a note told the maker (his son) that he never intended to collect it while he lived, and that after his death it should be the son's, *Denman v. McMahon, 37 Ind. 241*; that a donor had made a gift to his niece etc., *Wheatley v. Abbott, 32 Miss. 343; Kreider v. Boyer, 10 Watts 54; Batton v. Allen, 1 Hal. Ch. 99*; see *Doty v. Willson, 47 N. Y. 580; Clark v. Clark, 17 B. Mon. 698*; that the obligee [a father-in-law] took a bond from his son-in-law, for money advanced, because he could not write or keep a book, but that the obligee need not pay it back, *Haverstock v. Sarbach, 1 Watts & Serg. 390*;

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not only the rule already mentioned, but that which forbids the revocation of an instrument by an act less solemn than the act creating it. Here there is neither a payment nor an agreement for a good consideration to discharge, nor a technical release under seal. There is in the doctrine an encroachment upon the field designed to be covered by the statute of wills, because it permits a person by parol to give a direction to his property after his decease variant from the course it would take by the direction of the instrument executed in conformity with the requirements of the statute. The doctrine has been accepted in a few cases, but seems to have arisen from a desire to alleviate the supposed hardship of special cases, and from a mistaken view of what was ruled in a case decided in the high court of parliament as early as the year 1724. I allude to the case of *Wekett and wife v. Raby*, reported in 3 Bro. P. C. 16. This was that case: The testator made a will by which he made his daughter Mary his executor and residuary legatee. A man named Raby had been his counsel. The testator held Raby's bond for £255. In his last sickness the testator said to Mary, his residuary legatee:

"I have Raby's bond, which I keep. I don't deliver it up, for I may live to want it more than he, but when I die he shall have it. He shall not be asked for it."

that a stepmother told the payee of her note that she never intended to collect the money on it, and that if it was not paid in her lifetime it was to be his, *McGuire v. Adams*, 8 Pa. St. 286; that a father said he would never collect anything from his son, whose note he held, and "live or die, he should never pay him one cent," *Bradley v. Long*, 2 Strobb. 160; that a father entered in his account-book the amount advanced to his daughter on her marriage, declaring that he did not do this for the purpose of making a charge, but for his own gratification; and he afterwards expunged the entry, *Johnson v. Belden*, 20 Conn. 322; that a father took the note of his daughter's husband for a farm sold to the latter by the father, promising his daughter and her husband that the whole amount should go as a gift to his daughter, *Carpenter v. Dodge*, 20 Vt. 595; that a father caused a writing to be drawn disposing of a mortgage debt in favor of his son's (the mortgagor's) family, and executed it, and said that he did not intend to enforce it, but meant that it should be canceled at his death, *Chew v. Chew*, 8 C. E. Gr. 471.

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After the death of the testator Raby demanded the bond of Mary. She refused to deliver it, but said you may be easy, for it is safe in my hands.

He hinted that accidents or matrimony might put it out of her power to deliver it. She said if I marry I will deliver it the night before.

Afterwards Raby having acted, as Mary thought, in an unfriendly manner towards her, she put the bond in suit. A bill was exhibited in the court of chancery and the suit was restrained. There is no opinion in the case.

Before the high court of parliament, the counsel of the complainant put their case upon the doctrine that a trust was imposed on Mary, the executrix and residuary legatee, by the direction of the testator to her, and her acknowledgment thereof, and her express promise to deliver up the bond. There was no insistence that the parol declarations in themselves amounted to a discharge of the security. What the views of the court were is only inferential. Judge Story speaks of this as a case which would be clearly insupportable as a *donatio mortis causa*, and as carrying the doctrine of an implied trust, or equitable extinguishment of a debt to the very verge of the law. *Story's Eq. Jur.* § 706.

Mr. Pomeroy classifies the case as one supporting the doctrine that where declarations are made under such circumstances, that the testator imposed a constructive trust upon the property given by his will, so that the beneficiary would not be equitably enti-

The following were held sufficient: "Take back your writings [a bond and mortgage], I freely forgive you the debt," *Richards v. Sims*, *Barn. Ch.* 90; that a mother advanced money to her son, taking a mortgage therefor, and promised him that it should never be recorded or the money collected, *Peabody v. Peabody*, 59 *Ind.* 556; that a father requested his son to sign a note for the value of two horses given to him by his father, and represented to him that the note was never to be paid, *Harris v. Harris*, 69 *Ind.* 181; that an intestate said he had given his son something handsome; that he had held a writing against him, not a note, but had made him a present of it, *Wheeler v. Wheeler*, 47 *Vt.* 657; that a nephew had given his uncle a deed of trust on slaves, to secure moneys loaned, but that the uncle said he never claimed or expected any benefit therefrom, and that he had permitted his nephew to sell all the slaves that were worth anything, *Fitzhugh v. Fitzhugh*, 11 *Gratt.* 210.—**REP.**

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tled to the gift without, at the same time, carrying out the trust and discharging the debt.

The statement of Mr. Pomeroy is intended to include the cases in which the beneficiary by some act or word assents to the declared intention of the testator, so that thereafter it would be a fraud upon his part to refuse to carry out the testator's design, as by his assent he has induced the testator to rely upon it rather than change his will or incorporate his intention in a future will.

Of this class is the case of *Williams v. Vreeland*, decided in this court and reported in *5 Stew. Eq. 734*. That was the view taken by Lord Hardwicke in the case of *Byrn v. Godfrey*, *4 Ves. 6*. After mentioning the circumstances upon which *Wekett v. Raby* was decided, he says: "From all this, the court had a fair ground to conclude the case stood exactly according to the representation of the plaintiff, and, being so, the testator, talking to a residuary legatee, and that being admitted, so that the court has sufficient evidence, the residuary legatee will not be permitted to benefit herself of that which was not given to her. It is very near an undertaking by her to do something if the will is not changed. Therefore, the silence is assent on the part of the residuary legatee, and an engagement which, in point of conscience, ought not to be broken by her."

It is true that Lord Cottenham, in *Flower v. Marten*, *2 Myl. & Cr. 459*, took a different view of what was decided in the case of *Wekett v. Raby*. He seems not to have considered the case critically, nor to have had in mind the case of *Byrn v. Godfrey*. He mentioned the case of *Wekett v. Raby*, after he had already decided the case which he then had under consideration upon another ground, namely, that no debt had ever equitably existed.

In the subsequent case of *Cross v. Sprigg*, *6 Hare 552*, Vice-Chancellor Wigram says the circumstances of that case (*Wekett v. Raby*) bring it within the principle examined by the vice-chancellor in *Podmore v. Gunning*, *7 Sim. 644*.

The case of *Podmore v. Gunning*, was this:

A testator gave his real and personal property to his wife absolutely—

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"Having perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease."

Two natural children of the testator, after the death of the wife, filed a bill against the wife's heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his property, after her death, to the plaintiffs, and that she promised and undertook to do so.

The court held that upon proof of these facts a trust arose in favor of the plaintiff. This is the doctrine of *Williams v. Vreeland*, in this court, already mentioned.

In the case of *Sprigg v. Cross*, the vice-chancellor criticises with great care and acuteness all the preceding cases in the equity courts, and denies that voluntary declarations indicating an intention on the part of a creditor to forgive or release a debt, if there be no evidence of a release at law, constitute a release in equity.

This case was reversed, but upon a point which did not shake the force of this conclusion. The same learned vice-chancellor, four years later, had occasion, in the case of *Peace v. Hains*, 11 *Hare* 151, to reconsider the same question, and there refers with approval to his remarks in the case of *Cross v. Sprigg*.

In the case of *Yeomans v. Williams*, L. R. (1 Eq.) 184, the authority of the case of *Cross v. Sprigg* was recognized by Sir J. Romilly, M. R., and the case under consideration was decided upon the ground that a father-in-law had induced his son-in-law to live in a house by saying that he should pay no rent in the form of interest upon a mortgage held by the father-in-law upon the property, and that he could not collect interest, because he had induced the son-in-law to take a certain course of conduct by his statement.

In *Taylor v. Manners*, L. R. (1 Ch. App.) 48, the authority of the cases of *Cross v. Sprigg* and *Peace v. Hains* is assumed by the counsel, and Lord Justice Turner says at law certainly there was no perfect gift, and a court of equity as certainly will not enforce a mere intention to give.

I find no more recent allusion to this doctrine in the English

Barrow v. Van Winkle.

reports; but I think it is apparent that while the early decisions may be involved in some confusion, it cannot be said that the doctrine of *Leddel's Exrs. v. Starr* was the doctrine of the English court of chancery at the time when the law of that court became the law of this state. The case of *Wekett v. Raby* may not be satisfactory in any aspect in which it can be viewed; but that it did not establish the unqualified doctrine that a parol declaration of an intention to release operated as an equitable release, is, I think, clear. The doctrine of the courts of equity in England is now opposed to such a rule, and the utterances of those courts are in opposition to the claim that it was ever an established rule in those courts.

The case of *Leddel's Exrs. v. Starr* was, in my opinion, a departure from the theretofore prescribed limits of equitable interference with existing obligations. It was a departure in the direction of insecurity and uncertainty which this court should not follow. The decree below, founded upon this rule, should be reversed.

Decree unanimously reversed.

JAMES S. BARROW, appellant.

v.

DANIEL VAN WINKLE, respondent.

On appeal from a decree advised by Vice-Chancellor Dodd, who rendered the following opinion:

In the foreclosure suit of *Van Winkle v. Blakiston et al.*, I think there should be a decree that the mortgage of the defendant, Barrow, is a subsequent lien to the mortgages of the complainant. My conclusion is that the Barrow mortgage was taken with actual notice of those previously executed to the complainant.

Tresch v. Wirtz.

Mr. Chas. H. Voorhis, for appellant.

Messrs. Ackerson & Van Valen, for respondent.

PER CURIAM.

This decree unanimously affirmed for the reasons given in the foregoing opinion.

JOHN TRESCH, appellant,

v.

JOHN M. WIRTZ et al., respondents.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Tresch v. Wirtz*, 7 *Stew. Eq.* 124.

Mr. Job Lippincott, for appellant.

Mr. M. T. Newbold, for respondents.

PER CURIAM.

This decree unanimously affirmed for the reasons given by Vice-Chancellor Van Fleet.

Dodge v. Brokaw.

NORMAN W. DODGE et al., appellants,

v.

GARRET L. BROKAW et al., respondents.

On appeal from a decree of the chancellor, whose opinion is reported in *Dodge v. Brokaw*, 5 Stew. Eq. 154.

Mr. Wm. C. Spencer, for appellants.

Mr. S. B. Ransom, for respondents.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the chancellor.

MARTHA WILLIS, appellant,

v.

HENRY M. WILLIS, respondent.

On appeal from a decree advised by Vice-Chancellor Van Fleet, refusing a divorce to the appellant.

Mr. George R. Dutton, for appellant, *ex parte*.

An opinion in this case was prepared and delivered by Magie, J., reversing the decree below, on the ground that the facts relied upon by the appellant constituted desertion, and, therefore, she was entitled to a divorce. As only matters of fact were discussed, the opinion has, by Justice Mr. Magie's direction, not been published.

Decree unanimously reversed.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.
FEBRUARY TERM, 1883.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET AND JOHN T. BIRD, ESQS.,
VICE-CHANCELLORS.

CATHARINE B. LONG

v.

REGINA KINKEL et al.

A mortgage on lands was duly executed and acknowledged by the defendant and also by her daughter and son-in-law, and the latter delivered it to the complainant. The premises had, shortly before the mortgage was given, been conveyed to the defendant by the son-in-law, who represented that he still retained some interest in the lands, and who was authorized by the defendant to negotiate and obtain the loan secured by the mortgage. The money was paid

Long v. Kinkel.

by the complainant to the son-in-law when the mortgage was delivered.—*Held*, on foreclosure, that his failure to pay over the money to the defendant was no defence, and that the defendant's answer under oath, alleging that the mortgage was not delivered, was not of itself enough to overcome the presumption of delivery arising from the mortgagee's possession of the mortgage, duly executed and acknowledged.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. S. H. White, for complainant.

Mr. A. A. Van Hovenberg, for defendant Kinkel.

THE CHANCELLOR.

The mortgage in suit was executed by Mrs. Kinkel, who held the legal title to the mortgaged premises, and by her daughter and the latter's husband, William Killian. It is for \$2,350, and is dated October 20th, 1875. The defence is that although the complainant agreed to lend Mrs. Kinkel the money, and the mortgage was executed as security for the loan, yet the complainant fraudulently obtained possession of the mortgage (which the answer alleges was never delivered to her, without paying the money to Mrs. Kinkel, or giving her any consideration therefor. Killian and his wife applied to the complainant's attorney for the loan which the mortgage was given to secure. Killian represented to the attorney either that he owned or had some interest in the property. He had had the title to it and conveyed it to Mrs. Kinkel. The fact that at the time of the negotiation of the loan the title was in Mrs. Kinkel appeared by the record. The attorney therefore drew the mortgage to be signed by all three, Mrs. Kinkel, and Killian, and his wife, and it was signed and acknowledged accordingly. Mrs. Kinkel, according to her own testimony, requested Killian to get a loan for her on mortgage of the property, and he got it accordingly from the complainant. The contents of the mortgage were made known to her when she executed the papers. Killian, with her knowledge and consent, took the papers immediately after they were executed, to deliver them and get the money for them, and received

Coddington v. Stone.

the money from the complainant's attorney, to whom he delivered them. The mortgage was recorded November 4th, 1875. Subsequently, in June, 1876, Mrs. Kinkel gave another mortgage for \$1,000 on the property to Adam Scherer. She insists that her before-mentioned averments in her answer (which, in pursuance of the requirement of the bill, is on oath) have not been overcome by the evidence in the cause on the part of the complainant. In *Commercial Bank v. Reckless*, 1 Hal. Ch. 650, it was held that the possession by the mortgagee of the mortgage, duly executed and acknowledged, affords such cogent presumptive proof of delivery as cannot be overcome by the naked answer of the mortgagor. In this case it appears very clearly that the loan was negotiated for Mrs. Kinkel by Killian at her request, that she executed the bond and mortgage to the complainant with full knowledge of their contents, and for the purpose of enabling Killian to obtain the money for her on the security thereof, and gave them into his hands and authorized him to deliver them, and that she knew he got the money upon them, for she says in her testimony that she became (and still is) angry with him and his wife because they had not paid the money over to her. The fact that the money was not paid over to her by Killian, her agent, cannot avail her as a defence in this suit. *Westervelt v. Scott*, 3 Stock. 80; *Andrews v. Torrey*, 1 McCart. 355. There will be a decree in favor of the complainant.

JOHN C. CODDINGTON, admr. &c., et al.,

v.

J. HENRY STONE et al., executors.

A testator gave to his daughter the income of all his estate for life, and the principal to her surviving children, and appointed her and her husband executors. He died in 1866, and the husband alone proved the will and filed an inventory. The estate consisted of a mortgage of \$1,600; fourteen shares of insurance stock, appraised at \$1,400, and \$3,000 of United States bonds.

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The executor sold the mortgage, and paid \$800 to his wife and expended the other \$800 in the support of his family. Owing to heavy losses by fire in 1871, the insurance company reduced the fourteen shares of stock to five. The United States bonds were converted by the executor, who died in 1880.—*Held,*

(1) That his estate was liable for the \$800 received by him from the mortgage, with interest from the date of its sale, and also liable for the amount of the United States bonds, with interest to the time they were called, at the rate they bore, and afterwards at the rate fixed by law in this state.

(2) That under the act of March 17th, 1881 (*P. L. of 1881 p. 130*), his estate was not liable for the loss of the nine shares of insurance stock, and that under the circumstances it was not liable for interest on interest on the moneys converted by him.

Bill for an account. On final hearing on pleadings and proofs.

Mr. E. S. Savage, for complainants.

Mr. J. Henry Stone, for defendants.

THE CHANCELLOR.

John B. Whitman died in January, 1866, leaving a will by which he gave to his daughter, Sophia H. Spear, then wife of Henry Spear, all his property after payment of his debts, to hold it in trust; she to have the income, interest, dividends and profits thereof for her own use for her life; the principal, at her death, to be divided among such of her children as might be then alive. He appointed her husband and herself executors, but the former alone proved the will. He filed an inventory, by which it appears that the estate consisted of a real estate mortgage of \$1,600, fourteen shares of the stock of the Home Insurance Company, valued, at the time of making the inventory, at \$1,400, and United States bonds, valued at \$3,000. Nothing further appears of record in regard to his dealing with the estate. He died on March 10th, 1880, leaving a will. The bill is filed by the administrator *cum testamento annexo de bonis non* of John B. Whitman, deceased, and Mrs. Spear, against Messrs. Stone and Brown, executors of Mr. Spear, and Mrs. Spear's children. It

Coddington v. Stone.

prays an account and payment of the money due to her as residuary legatee under her father's will. Whether Mr. Whitman left any debts or not does not appear, nor does it appear what Mr. Spear paid for the funeral expenses. The questions submitted on the hearing were based on the assumption that the executors of Mr. Spear are bound to account for the whole of the estate inventoried. It appears that Mrs. Spear received all the interest upon the mortgage up to the time when it was assigned away. She received \$800 of the principal. The rest of it, \$800, was received and expended by Mr. Spear. She says it was expended in the support of the family. It was his duty to provide such support, and the money, therefore, is chargeable to his estate, with lawful interest from the time when he received it. The insurance stock was an investment made by the testator himself. After it was inventoried there was a loss of nine shares through the reduction of its stock by the company by reason of losses incurred by the Chicago fire. The remaining five shares were subsequently sold and the proceeds paid over to Mrs. Spear. Mr. Spear's estate is not chargeable with the loss of the nine shares. It does not appear and is not alleged that he did not act in good faith and with reasonable discretion in holding the stock. The will of Mr. Whitman appears to contemplate the continuing by his executors of the investments left by him. The act of March 17th, 1881 (*P. L. of 1881 p. 130*), declares that where a testator shall have made in his lifetime any investment of money on bond secured by mortgage, or in the bonds or stock shares of any corporation, and the same bonds, mortgages or stock shares shall come or shall have come into the hands of the executor or trustee of such testator to be administered, and such executor or trustee may, in the exercise of good faith and a reasonable discretion, have continued such investment, or may thereafter continue the same, he shall not be accountable for any loss by reason of such continuance, provided that the act shall not apply to cases where the deed of trust or the will or the court having jurisdiction of the matter specially directs in what manner the trust fund shall be invested. Mr. Spear converted the government bonds to his own use. The date of the conversion was, it is

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agreed by counsel, January 1st, 1873. His estate is bound to account for the principal and interest at the rate which the bonds bore up to the time when they were called, and after that at lawful interest of this state. His estate should not be required to pay interest on interest. His wife seems to have acquiesced in his conversion of the \$800 and the bonds to his own use and in his nonpayment of interest to her, and while that would not relieve his estate from the payment of the interest to her now, it will protect it from the imposition of any penalty for her benefit. There will be a decree for an account accordingly.

CHARLES STINES

v.

AARON HAYS.

In 1871, the complainant and two adjacent land-owners agreed in writing with the defendant to convey to him a strip of land for a road, with an exception or reservation to the vendors of a right to use the road. By a mistake of the scrivener, who was chosen by the defendant, the complainant's deed did not state that the strip was conveyed for a road, and also omitted the exception or reservation of his right to use it. The road was used by the complainant from 1871 to 1881, when the defendant denied his right to use it. The complainant discovered the mistakes in his deed in 1879.—*Held*, that the deed should be reformed so as to state that the land was conveyed for use as a road, and also complainant's right to use it.

Bill for relief. On final hearing on pleadings and proofs.

Mr. Geo. O. Vanderbilt, for complainant.

Mr. John Schomp, for defendant.

THE CHANCELLOR.

This suit is brought to rectify a deed given August 15th, 1871, by the complainant, Stines, and his wife to Hays, the de-

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fendant, for a strip of land sold July 25th, 1871, by Stines to Hays for a roadway. At the time of the sale and conveyance, the complainant was the owner of a farm, whereon he resided and of which the strip then formed part, lying on the public road from Kingston to Rocky Hill, and the defendant owned a farm on which he lived, in the rear of the complainant's property. For very many years—perhaps for half a century or more—there had existed a drift-way, to the use of which the defendant had a right from his farm to the highway over the complainant's farm at and along the northern boundary thereof. There were three gates across this drift-way. The complainant also used the drift-way. The defendant, in order that he might have an open and a better road, one which he might put and keep in good condition, desired to buy for the purpose the before-mentioned strip from the complainant, and certain land of William A. Pierce and Charles B. Moore, respectively, which adjoined the complainant's property for part of the way, and which would be needed for the road. The drift-way was on the strip which the defendant wished to buy of the complainant. The defendant bought the requisite land from the complainant, and Pierce and Moore, respectively, and an agreement in writing dated July 25th, 1871, for the purchase and sale was entered into between him and them accordingly. By that agreement Hays agreed to purchase all the land then occupied by him as a road, lying between the property of Stines and the lands of James Tynan, Pierce and Moore; the road to be surveyed within a time and by a surveyor named in the agreement, and to be twenty-six feet wide. And it was also thereby agreed that Hays should pay at the rate of \$100 an acre for the land, and make and keep in repair the fence along the road, and be at all the expense of surveying the road and attending to the sale of the land for the road. And the other parties to the agreement thereby agreed to make him a good and sufficient deed according to the agreement. The agreement further provided that the purchase-money should be paid on the making of the deeds; that the purchaser should not disturb the growing crops, and that each of the parties should have the use of the road by making

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bars in the fence. Deeds were executed and delivered by the vendors to Hays for the land by them respectively sold to him. The deed from the complainant contained a provision in regard to the fence, which, according to the statement of the bill, is as follows:

"The said Aaron Hays, party of the second part, is to make and keep in repair all the fence on south sides of this road, and to be at all expense of the same."

But it contained no reservation or grant of the right to the complainant to use the road, nor any other covenant on the part of the defendant except that just quoted. Soon after the deeds were delivered, the defendant set the fences on both sides of the road, and removed the gates. The complainant appears to have had the use of the road for access to the part of his farm adjacent to it until the spring of 1881, when the defendant denied him all further use of it. In the spring of 1879, the complainant first discovered that the deed from him to the defendant contained no provision securing to him the use of the road. The bill is filed to reform the deed by making it conform to the agreement, both in respect to the use of the road by the complainant, and the making and keeping in repair of the fence by the defendant. The defendant, while he does not by his answer deny that the agreement contained the provision in regard to the use of the road by the complainant, alleges therein that he never understood that the complainant was to have any right to use the road in any way, and says that if any such expression appears in the agreement, it was contrary to his understanding and was not noticed by him, and must have crept into that instrument inadvertently and by mistake. He also insists that the deed was drawn in accordance with the agreement between the parties, and that it is conclusive evidence of what the agreement between them was. He also avers that the use which the complainant made of the road was, and was understood by the complainant, to be merely by his permission as a neighborly courtesy, and not of right or under a claim of right. The evidence that the provision for the use of the road by the complainant was contained in the

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agreement is plenary. It also appears clearly that the defendant understood and knew it was there. When the agreement was drawn it did not contain it. After it was drawn and when it was read over to the parties, the complainant objected because it did not contain the provision, and it was then inserted. Alexander Gulick, the subscribing witness, testifies on the subject as follows :

“The agreement was all drawn ready to be signed by the parties, and the parties were there to sign it, and Mr. Stines objected to signing it until that clause was put in by Mr. Moore (who drew the agreement), and that is the way it was squeezed in, as the agreement shows ; Mr. Stines insisted on the clause being put in ; I said it was good enough ; Mr. Hays did not say anything, and Mr. Moore went on and completed it ; Mr. Hays had not signed the agreement before the clause was put in.”

The complainant's testimony on the subject is to the same effect. Mr. Moore testifies that after he had drawn the paper he read it over and laid it on the desk, stepped back to where Mr. Stines was sitting on the counter, and Mr. Stines said to him, “You have left out the use of the road ;” that this was either before or after the agreement was signed, and that he called the attention of the parties to it and it was inserted. There is some corroboration of the testimony of these witnesses on this point in that of Henry Silcocks, who was present when the agreement was signed. Nor does the defendant himself deny, with any degree of positiveness (and he is not supported by any witness), that the addition was made to the agreement as alleged by the complainant and Messrs. Gulick and Moore. And even if he did so positively, his testimony would not countervail that on the part of the complainant ; for the fact would still stand proved by the preponderance of evidence. By the agreement it was provided that the defendant should be at all the expense of surveying the road and attending to the sale. He employed a scrivener, who was also a surveyor, to make the requisite surveys and draw the deeds, and they were made and drawn by him accordingly. The scrivener never saw the agreement nor any copy of it. Nor did he receive any instructions from the complainant on the subject of the deed. To the question whether he put

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everything in the deed that the parties asked him to put in, he answers that he does not think either of them gave him any instructions; that they said they wanted a deed for the land which was sold. And it is quite probable, from his testimony, that if he had seen the agreement, he would not have inserted the provision as to the use of the road in the deed. He appears to have regarded it as correct practice in conveyancing, not to introduce such matters in deeds of conveyance of land. When asked whether, if the parties to the agreement had wished to have its terms incorporated in the deed, he would have done it, he answered that he did not think he would have done so. He testifies, indeed, that he read the deed over to the complainant and his wife when it was executed, but they both testify to the contrary; and it is not at all unlikely that his recollection on that subject is not to be relied on, seeing that when he gave his testimony, ten years had elapsed since the execution of the deed. Still further, the fact that he certified to the acknowledgment of Mrs. Moore on the deed from her husband and herself to Hays, when she had not signed the deed (and never signed it), as he well knew, repels all presumption based on his carefulness or practice. It is apposite to remark that though when he was first called, he testified that he thought he read the deed from Moore to the defendant over to Moore and his wife, he subsequently said that he did not think he read it over to Mrs. Moore, but only told her what it contained—that it was a deed for a piece of roadway to Mr. Hays. The complainant swears that he did not know until 1879, that the provision in question was not in the deed. There is no evidence whatever that there was any understanding between the parties that the provision should not be in the deed, nor any evidence that the complainant agreed to relinquish the benefit of it, but on the other hand, there is abundant evidence that he insisted on his right to it, from the time when the deed was given: Nor is there any evidence that the deed contains the final agreement between the parties, nor that the complainant, with knowledge of the omission, acquiesced in the deed. Where an instrument is drawn and executed which professes or is intended to carry into

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execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument. *Hunt v. Rousmaniere*, 1 Pet. 1; *Wintermute v. Snyder*, 2 Gr. Ch. 489; *Loss v. Obry*, 7 C. E. Gr. 52. The jurisdiction of the court of chancery to relieve against deeds drawn up by mistake, contrary to the intention of any one of the parties, is, says Mr. Spence, of a very early date. 1 *Spence's Eq. Jur.* 633. Nor will the fact that the defendant denies that there is a mistake, and testifies that the deed was drawn according to the intention of the parties, prevent the court from granting the relief, if it is satisfied that the deed is not in accordance with the agreement, but ought to be so. *Gillespie v. Moon*, 2 Johns. Ch. 585; *Kerr on F. & M.* 421; *Loss v. Obry*, *ubi supra*; 1 *Story's Eq. Jur.* §§ 156, 157. In this case, the complainant reserved to himself the right to use the road, and was careful to have a provision to that effect inserted in the agreement; and the agreement provided that the deed should be made according to the agreement. It is but just that the deed should, under the circumstances, be reformed so as to include the reservation, and secure to the complainant the right which constituted part of the consideration of the conveyance. If it was omitted from the deed by the direction of the defendant, against the will of the complainant, and without his knowledge, it was omitted by fraud; otherwise, it was by mistake. In either case, the complainant is entitled to relief. The attempt to prove that the complainant has a better and more convenient and direct road over his farm to the land bordering on the road in question, if it had been successful, obviously would not have affected his right to the relief he seeks; for the question is not whether he needs the right to use the road, but whether it was agreed that he should have it. Such proof is only competent upon the question as to whether there was in fact such an agreement; but the evidence of the written instrument, and the testimony of Messrs. Moore and Gulick and the complainant, leave no room for doubt on that head. As to the provision for making and

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keeping in repair the fence, the deed is in conformity to the agreement. The agreement provides that the defendant shall make and keep in repair the fence along the road. The deed provides that he shall make and keep in repair all the fence on "south sides of this road." The word "south" was undoubtedly originally written "bouth" (both). The agreement does not require the defendant to make and keep in repair the fences on both sides of the road, but the fence along the road. The deed makes no previous reference to the road. It is merely a conveyance of the strip of land, with no indication as to the use to which it is to be devoted, except from the words "this road" in the provision under consideration. It should be amended by inserting a statement that the land was sold and conveyed for use as a road. The complainant is entitled to a decree rectifying the deed by inserting the provision securing to him the use of the road, and also a statement as to the use for which the land was sold and conveyed. Under the circumstances, he should have costs.

MOSES CONDIT

v.

JAMES F. WILSON et al.

1. A mere vague, general statement by a mortgagor to his creditor, before suit brought, that his property was mortgaged for all it was worth, is not notice of an unregistered or unrecorded mortgage on his land.

2. Notice of an unregistered or unrecorded mortgage on lands at the time of selling the lands under a judgment, is invalid if the creditor had not notice when he recovered his judgment.

3. The statute (*Rev. p. 706*) provides that an unregistered or unrecorded mortgage shall be void and of no effect against a subsequent judgment creditor, or *bona fide* purchaser or mortgagee, for a valuable consideration, without notice.—*Held*, that the phrase "for a valuable consideration" applies only to purchasers or mortgagees, and therefore a judgment creditor who buys the

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debtor's land at an execution sale under his judgment, and credits the price on his judgment, holds the land free from a prior unregistered or unrecorded mortgage thereon of which he had no notice, and such mortgagee has no right to redeem.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. A. P. Condit, for complainant.

Mr. J. W. Field, for defendants Dunning and Hardin.

THE CHANCELLOR.

The bill is filed for the foreclosure and sale of mortgaged premises. The mortgage is for \$2,000 and interest; is upon land in the city of Orange; was given to the complainant by James F. Wilson and wife; is dated January 1st, 1870, but was not registered until October 17th, 1878, nearly nine years afterwards. The defendants Edgar A. Dunning and Alfred Hardin recovered a judgment for \$422.06 against Wilson in the Essex county circuit court, December 5th, 1876. Under an execution issued on it March 11th, 1878, the sheriff of that county sold the property to Dunning in June following. The complainant, by his bill, alleges that Dunning and Hardin, when they recovered their judgment, and at the time of the sheriff's sale, had notice of his mortgage; and prays that it may be decreed that any estate, right, title, or interest, which may have

NOTE.—It has been held that a notice of prior unrecorded liens at the time of sale would not affect a judgment creditor purchasing under his own judgment, and crediting his bid on his judgment, if he had no notice thereof when his judgment was recovered. *Fash v. Raresces*, 32 Ala. 451; *Gower v. Doheney*, 33 Iowa 36; *Wood v. Chapin*, 13 N. Y. 509; *Wallace v. Campbell*, 54 Tex. 87; *Humphrey v. Copeland*, 54 Ga. 543; *Hulings v. Guthrie*, 4 Pa. St. 123; *Uhler v. Hutchinson*, 23 Pa. St. 110; but, generally speaking, such purchaser is not considered a *bona fide* purchaser, since he parts with no new consideration, *Freeman on Ex.* § 336; *Freeman on Judg.* § 366; *Herman on Ex.* § 328; *Rorer on Jud. Sales* § 170; 2 *White & Tud. Lead. Cas.* (4th ed.) 94-99; 1 *Jones on Mort.* §§ 460-463; see, also, *Garwood v. Garwood*, 4 Hal. 193; *Herbert v. Mechanics Assn.*, 2 C. E. Gr. 497; *Uhler v. Semple*, 5 C. E. Gr. 288, 293; 2 *Pomeroy's Eq. Jur.* § 724.—REP.

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vested in Dunning, either individually or as trustee for himself and Hardin, by virtue of the sheriff's sale, is subject to the complainant's mortgage, and that the mortgage, notwithstanding the sale, remains a subsisting lien on the property prior to the sale and judgment, or that Dunning may be decreed to release to the complainant his title to the property derived from the sale, on payment of the expenses of the sale and the costs of the improvements put by him on the premises since the sale; or that he may be decreed to so release and to assign the judgment on payment to him of the amount of it, with the costs of the sale and the cost of his improvements; and the bill also prays for foreclosure and sale. Dunning and Hardin have answered separately. By their answers they deny notice either at the time of the recovery of the judgment or at the time of the sale, and allege that Dunning bought the property wholly on his own account.

To succeed in this suit it is necessary for the complainant to prove notice to Dunning and Hardin, or one of them, at the time of recovering their judgment. His mortgage was not on record then, and indeed, it was not recorded until more than three months after the sale under the judgment. If neither of them had notice of the existence of the mortgage then (at the time of recovering the judgment), the purchaser, Dunning, holds the property clear of the mortgage. *Rutgers v. Kingsland*, 3 Hal. Ch. 178; *S. C. on Appeal*, Id. 658; *Holmes v. Stout*, 2 Stock. 419; *Coleman v. Barklew*, 3 Dutch. 357; *Sharp v. Shea*, 5 Stew. Eq. 65. If neither of them had notice of the existence of the mortgage at the time of the recovery of the judgment, it will make no difference that Dunning had notice at the time of the sale. Nor does it alter the case that he is one of the plaintiffs in the judgment. There is no proof of notice to him or Hardin before or at the time of the recovery of the judgment. Wilson, indeed, swears that before the recovery of the judgment he had a conversation with Hardin, in which he told him that the property was "mortgaged for about all it was worth." He does not fix the time of this conversation definitely. He says it might have been in 1874 or 1875, and adds that he will not

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swear positively it was not in 1876. Both Dunning and Hardin, on the other hand, swear that when the judgment was recovered they did not know that Wilson owned the property, and that they did not know it until 1878. There is very great reason to believe that Wilson not only did not communicate the fact of his ownership of the property to Dunning or Hardin, or refer to it as being his, but successfully strove to mislead the former (who alone appears to have given attention to the business of collecting the judgment) as to the ownership, and induce him to believe that the property belonged not to him but to his wife. The burden of proving notice is, seeing that his mortgage was not recorded when the judgment was recovered, on the complainant. Taken by itself, and irrespective of Hardin's denial, the testimony of Wilson is not sufficient to prove notice. He testifies, as before stated, that he told Hardin that the property was mortgaged for about all it was worth ; but he did not say to whom nor for how much it was mortgaged. Had Hardin gone to the records to inquire as to the truth of this statement, he would have found no mortgage at all on the property.

It is to be borne in mind that the conversation took place, as Wilson says, after one of his notes had gone to protest, and he says it was before they thought of suing him, so far as he knew. The mere vague statement of a debtor to his creditor, who is inquiring after the debtor's property with a view to compelling payment of his debt out of it, that his property, or any particular part of it, is mortgaged for all it is worth, is not notice of the existence of any particular mortgage. It is merely a statement that the debtor's property is encumbered to such an extent that the creditor cannot expect to realize anything for his debt out of it, if he should attempt to do so by legal proceedings, and that the encumbrance is in the form of a mortgage or mortgages. Naturally the creditor would, under such circumstances, betake himself to the records to ascertain whether the statement was true or not, and if he found no mortgage there, would conclude that it was false, and merely intended to mislead in order to protect the property. Under such circumstances, considering the antagonistic relation of the parties, the debtor and the cred-

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itor, to each other, the latter owes no duty to the mortgagee or mortgagees to make inquiry of the debtor as to the particulars of the alleged encumbrances, and it is no fraud if he fails to do so. But, as before stated, Hardin denies that he received this notice. He swears that he did not know that Wilson owned the property until 1878. The fact of notice is not established.

But the complainant insists that Dunning is not entitled to hold the property as against the complainant's mortgage, because he is not a *bona fide* purchaser for valuable consideration, and that the complainant is at all events entitled to redeem the property by payment of the money due on the execution under which it was sold, including sheriff's fees of the sale and the cost of the improvements put on the property by the purchaser. The statute provides that an unregistered or unrecorded mortgage shall be void and of no effect against a subsequent judgment creditor, or *bona fide* purchaser, or mortgagee for a valuable consideration without notice (*Rev. p. 706*), and it is urged by complainant's counsel that inasmuch as the purchaser, being the judgment creditor, parted with nothing for the property, but the price was merely credited on his judgment, he is not to be regarded as a *bona fide* purchaser for a valuable consideration. The judgment creditor's title as against the mortgage is not affected by the fact that he parted with nothing as the price of the property. The qualifying words used in the statute, "for a valuable consideration," manifestly have no reference to judgment creditors, but only to purchasers or mortgagees. The cases cited on this point are therefore none of them applicable to the case in hand.

Nor has the complainant the right to redeem. No question is raised as to the validity of Dunning's title under the judgment, except on the ground of notice. The statute declares that the unregistered or unrecorded mortgage is void and of no effect against the judgment creditor not having notice of it. The purchaser at the sale under the judgment therefore takes title to the property clear of the encumbrance of the mortgage. And as before remarked, it makes no difference whether the purchaser is the judgment creditor or a stranger. The bill must be dismissed, with costs.

Sternberger v. Hurtzig.

MAYER STERNBERGER et al.

v.

MARTHA F. HURTZIG.

The complainants sold the defendant a lot of land, the bargain being made through a firm consisting of defendant's husband and one Nones. The complainants, afterwards needing this lot to build a stable on their adjacent land, agreed with defendant's husband that she should take another lot belonging to complainants in exchange for the one first sold to her, and the complainants further agreed with defendant's husband to build a stable for her on the exchanged lot, and did so. Thereupon complainants built part of their own stable on defendant's first-mentioned lot. It did not appear that the husband had any authority to bind his wife.—*Held*, that an injunction to restrain defendant from proceeding at law to recover her first-named lot, could not be allowed.

Bill for relief. On demurrer, general and special, to bill.

Mr. Charles Haight, for demurrant.

Mr. John E. Janning, for complainants.

THE CHANCELLOR.

The bill is filed by Mayer and Simon Sternberger and their wives against Martha F. Hurtzig for an injunction to stay an action of ejectment brought by her against the complainants, and for other relief. The grounds of suit here appear to be, according to the bill, that the complainants sold and conveyed to the defendant a lot of land at Long Branch; that the bargain for the sale and conveyance was made by them with the firm of A. Nones & Co. (which was composed of Alexander Nones and Emil Hurtzig, the defendant's husband), who directed that the deed be made to the defendant, and the property was so conveyed accordingly; that after the conveyance the complainants, Mayer and Simon Sternberger, who owned the adjoining land, proposed to build stables on their property, and needed, in order

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to carry out their plans, Mrs. Hurtzig's lot; that they therefore agreed with her husband that she should exchange her lot with them for another as nearly as possible in the same location, but of larger size (what particular lot, if any, was designated, is not stated), and he then instructed Mayer Sternberger to proceed to construct for Mrs. Hurtzig a stable on such other lot, and he did so, and that she is now proceeding by action of ejectment against the complainants to recover possession of her lot (the one first mentioned), on which, it would appear, the Sternbergers have built part of their stables, and she refuses to pay for the stable built by the Sternbergers for her on the lot which they proposed to exchange with her for hers. The bill is insufficient. No relief can be granted on it. It is wholly based on an alleged agreement made by Hurtzig in regard to his wife's land, and it does not appear, and, indeed, it is not even alleged, that he had any authority whatever to bind her. Nor does it appear in any way that she is bound by it, or in any way estopped, either by acquiescence or otherwise, from proceeding at law to recover possession of the property conveyed to her by the complainants. The mere fact that the contract for the sale of the land was made with A. Nones & Co. is obviously not enough to bind her by their agreement made for her after the conveyance, and it is equally obvious that her husband, merely as such, had no power to bind her in the premises. The demurrer for want of equity will be allowed.

SARAH E. WALKER, as executrix and individually,

v.

CHARLES E. WALKER et al.

1. A non-resident testator gave to his wife and son the joint income and use of all his estate for their natural lives, with remainder to his lawful heirs, and also directed that no portion of his estate should be sold unless necessary for

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the maintenance of his son, and then only so much as might be required for his maintenance. His widow, who was his executrix, filed a bill, as executrix and individually, against the son and the testator's brothers and herself as guardian (appointed in Massachusetts) of the former, who is feeble-minded, for a decree directing her to sell testator's lands in this state, on an allegation that the proceeds of the sale of such lands were needed for the son's maintenance.—*Held*, that the suit should have been brought in the name of the son.

2. On dismissal of the bill no costs were awarded; none to testator's brother, who answered, because he ought to have demurred; nor any to the son (for whom a formal answer was put in by his guardian *ad litem*), because the suit is presumed to have been brought on his behalf.

Bill for relief. On final hearing on pleadings and proofs. Submitted on briefs.

Mr. R. F. Stevens, Jr., for complainant.

Mr. R. B. Seymour, for answering defendant, Gerry Walker.

THE CHANCELLOR.

The bill is filed by Sarah E. Walker, of Massachusetts, individually and as executrix of Joseph E. Walker, deceased,

NOTE.—An administrator cannot bring suit against himself to recover a debt due to him from his intestate, *Perkins v. Perkins*, 11 R. 1. 270.

Two executors cannot confess a judgment to a partnership of which one of them is a member, *Pearson v. Nesbit*, 1 Dev. 315.

A complainant cannot, in his individual capacity, sue himself as executor, *Black v. Shreve*, 3 Hal. Ch. 457.

Executors may, in equity, sue a co-executor for a debt due from him to the estate, *Ransom v. Geer*, 3 Stew. Eq. 249; see *Martin v. Martin*, 13 Mo. 36.

An executor cannot sue, at law, on a promise made jointly by himself and the defendant, *Moffatt v. Van Mullengen*, 2 Chit. 539; ——— v. *Adams*, *Younge* 117.

An assignee in bankruptcy of B cannot sue himself and a surety on an injunction-bond given by them to B before B's bankruptcy, *McElhanon v. McElhanon*, 63 Ill. 457.

An administrator of a depositor suing a savings bank for the benefit of the donee of the intestate, cannot be also defendant, *Pierce v. Boston Sav. Bank*, 125 Mass. 593.

An administrator cannot sue on a bond given by his co-administrator to the intestate, by assigning it to a third party and having him re-assign it to the plaintiff in his individual name, *Simon v. Albright*, 12 S. & R. 429.

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her late husband, to obtain direction to sell, as executrix, part of the land in this state of which the testator died seized. By the will, the testator, after directing payment of his debts and funeral expenses, devised and bequeathed as follows:

"I give, devise and bequeath to my wife, Sarah E. Walker, and to Charles E. Walker, my son, the use, income and improvement of all my estate, both real and personal, during their natural lives, and at their decease I give, devise and bequeath all that may remain to my lawful heirs, and I direct that no portion of my estate shall be sold unless it may be for the maintenance of my son, Charles E. Walker, and then only so much as may be required for his maintenance; that my wife and son may hold and enjoy said property jointly."

He gave no express power of sale. Under the will, a power of sale, however, is implied, if sale should be required for the maintenance of his son. The defendants to the bill are the testator's son and the testator's two brothers (the brothers are his heirs, if his son be excluded), and the testator's widow, the complainant, as guardian of the son, who has been declared to be of unsound mind by a court of probate in Massachusetts, where he lives, and of whose person and estate the complainant has been appointed guardian by the same court. One of the testator's brothers has

A cannot sue B and join himself as a defendant as trustee of C, *Hoag v. Hoag*, 55 N. H. 172.

One or several members of a copartnership cannot sue the other members at law, *Mainwaring v. Newman*, 2 B. & P. 120; *Fitzgerald v. Boehm*, 6 Moore 332.

One member of an unincorporated association cannot sue another to recover funds in which both parties are equally interested, *Warner v. Stearns*, 19 Pick. 73; *Teague v. Hubbard*, 8 B. & C. 345.

Partition cannot be granted where the petitioner is seized of one moiety in his own right, and, together with the respondents as joint trustees, of the other moiety in trust for another party, *Winthrop v. Minot*, 9 Cush. 405.

Several plaintiffs cannot garnishee one of themselves in attachment, *Belknap v. Gibbens*, 13 Metc. 471; *Columbus Ins. Co. v. Eaton*, 35 Me. 391; *Blaisdell v. Ladd*, 14 N. H. 129; but see *Richardson v. Gurney*, 9 La. 285; *McDonald v. Carney*, 8 Kan. 24.

Where two companies are composed in part of the same individuals, no action at law can be maintained by one against the other, *Portland Bank v. Gershom*, 11 Me. 196.—REP.

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answered, and the usual formal answer has been put in for the son by his guardian *ad litem* appointed in this suit. He has no guardian of his person or estate appointed in this state. It appears by the bill, and the proof sustains its allegations, that the testator's estate consisted of a small amount of personal property in Massachusetts, and some real estate of considerable value there, and some real estate in Hudson county in this state; that the testator's interest in the real estate in Massachusetts has been sold under the foreclosure of mortgages thereon, and that it did not bring the amount of the encumbrances. It also appears that it is necessary to sell the land here to provide for the maintenance of the son. But the will does not confer on the complainant, either as executrix or individually, the power of sale. The appointment of a person as executor of a will which directs the sale of land, does not of itself confer on him the power of sale, though if he is directed by the will or bound by law to see to the application of the proceeds of the sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personalty, which it is his duty to dispose of and pay over, then a power of sale is conferred on him by implication. 1 *Sugd. on Pow.* 139; *Lippincott v. Lippincott*, 4 C. E. Gr. 121. In *Geroe v. Winter*, 1 Hal. Ch. 655, it was held that under a devise of land to three children in fee to be divided or sold, as two out of the three could agree, the executors had no power of sale. Here the complainant, as executrix, has no express power of sale, and she is not charged with the application of the proceeds of the sale, and would have no control over the disposition of them. The devise is to her and the son for life, with remainder, as to so much of the estate as may remain at their death, to the lawful heirs of the testator. Individually she has no power; for none is conferred on her expressly, and none arises by any implication. Nor is even the existence of a necessity for making a sale left to her judgment. The terms of the devise prohibit a sale unless it should be necessary for the son's support, and in that case confines the exercise of the power to the sale of only so much of the property as it may be necessary to sell for that purpose. This court can judge whether the necessity in fact

Gould v. Gould.

exists, and can authorize a sale. And here it may be remarked that while it appears that all the testator's real estate in Massachusetts has been sold under foreclosure, and nothing realized therefrom for his estate, the testimony on the subject gives rise to a serious suspicion that the foreclosure proceedings were in fact amicable and conducted in the interest of the complainant herself, for the purpose of cutting off the remainder and placing the title within her own reach, so that she may obtain it in fee by paying the encumbrances. Apart from that, however, it is enough to say that this suit is not properly brought. Mrs. Walker has no claim, either as executrix or individually, to the relief which she seeks. The suit is brought against her son and (incongruously enough) against herself too as his guardian. Under a suit properly instituted this court could protect his rights and those of all other parties in interest in the proceeds of the sale. The bill will be dismissed. But no costs will be allowed to the answering defendant, Gerry Walker. He ought to have demurred to the bill. *Dawes v. Taylor*, 8 *Stew. Eq.* 40. None will be awarded to Charles E. Walker, for the suit is presumed to have been brought on his account.

EMMA R. GOULD et al.

v.

CHARLES J. GOULD et al.

A married woman lent money to her husband for the firm of which he was a member, on his representation that it was borrowed for the firm.—*Held*, that she might recover it from the firm.

Bill for relief. On final hearing on pleadings and proofs.

Mr. C. Parker, for complainants.

Gould v. Gould.

THE CHANCELLOR.

This is a suit by Mrs. Gould, trustee, and her mother, Jeanette Deouil, her *cestui que trust*, to recover \$650 of the trust-money lent by Mrs. Gould to her late husband's firm of J. Gould & Sons, May 1st, 1876. The money was borrowed by her husband on the credit of and for his firm for use in their business, as he represented to her when he got the loan. As security he gave her the firm's draft for the amount on the bank in Newark (the firm did business in that city and in New York, and kept bank accounts in both places) in which they kept their account, payable in one year. The firm was dissolved January 1st, 1877. This suit was before the court on demurrer, and the question of the liability of the defendants on the averments of the bill was decided adversely to them. *Gould v. Gould*, 8 Stew. Eq. 37, affirmed on appeal, *Id.* 562. The answer denies that the firm was in want of money when the money was borrowed, and denies also that the loan was made at their instance or request. It alleges that the money was lent to Mr. Gould individually, and the draft given by him without the authority, knowledge, or consent of his copartners and for his own debt, and that he borrowed the money and applied it to his own individual purposes; and that Mrs. Gould received the draft for security for what was, as she knew, the private debt of her husband. It also alleges that Mr. Gould paid the draft by the subsequent transfer of valuable real estate to her. The proof sustains the bill. It appears that Mrs. Gould for a time refused to lend the money to her husband for his firm, because she apprehended that she could not safely do so for the reason that he was a member of the firm. She consulted counsel on the subject, and was advised that she might safely lend the money to the firm, and she did so accordingly, taking the draft for security. The draft was dated on the day it was given, and the money was paid over on that day, after the draft was made and on the security of it. The \$650 may have been appropriated by Mr. Gould to his own purposes. If so, that would not, under the circumstances, affect the complainant's right to recover. She knew nothing of any fraudulent intention (if any there were, in fact) on the part of her husband,

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but in good faith lent the money to him for his firm, and on its credit, and for use in its business. Nor is there any proof that the money or any part of it was ever repaid to her. There will be a decree for the complainants.

JOHN COMBES, executor &c.,

v.

CATHALINA CADMUS et al.

A testator gave all his residuary estate (real and personal) to trustees, with a discretionary power to sell the real estate and to pay the income of the whole estate to his widow for life, or until her remarriage. The estate consists of mortgages, the homestead, which the widow occupies, and some unimproved city lots, which cannot now be sold advantageously. There is therefore no income or revenue except the interest on the mortgages. The widow insists that the taxes on the unimproved property should not be paid out of that interest, but from sale of the lots.—*Held*, that the trustees must pay the taxes on the lots out of the interest received from the mortgages.

Bill for construction of will and directions to executor. On final hearing on pleadings and proofs.

Messrs. Bentley & Hartshorne, for complainant.

Messrs. Cortlandt & R. Wayne Parker, for answering defendant.

THE CHANCELLOR.

The bill is filed by John Combes, one of the executors of the will of Richard Cadmus, deceased, against his co-executor, Cathalina Cadmus, widow of the deceased, and other persons interested in the estate, for a construction of the will, and directions. The testator died in 1873. By his will he devised and bequeathed to his wife, his son-in-law, the complainant,

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and his nephew, William J. Cadmus (now deceased), or the survivor of them, all the remainder of his estate, both real and personal, to have and to hold the same for the following uses, viz., after paying all his debts, to pay to his wife, while she should remain his widow, the income of all his estate whether real or personal, and provided that if she should marry they should pay to her the interest of \$6,000 only; and that after her death or remarriage, his personal estate should be equally divided among his children, with limitations over in case of their death with or without issue. And as to his real estate which should remain unsold at his wife's death or remarriage, he ordered his executors, or the survivor of them, to sell it as soon as it properly could be done without sacrifice, and at the end of each year divide the proceeds of the sales of the land sold during the year among his children equally; the issue of any who may have died leaving lawful issue to take the parent's share. And he directed that the sales of land should thus go on year after year until all the land should have been sold. And he also gave his executors, and the survivor of them, power to sell and convey any part of his real estate as to them should seem best for his estate. The estate consists of some investments on mortgage, and except the homestead, which the widow occupies, unproductive real estate, building lots, for which there is at present no such demand as to justify the sales thereof. The income from the investments on mortgage has been used to pay the taxes on this real estate. The widow objects to such use of it, claiming that she is entitled to the gross income of the investments, and that the taxes on the unimproved property should be paid by the remaindermen. The executor (of three appointed, one is dead) brings this suit for a construction of the will on this head.

The testator, by the will, blends the real and personal estate together, and gives the widow the use of all of it for life. As life-tenant she is bound to pay the taxes, and she is bound to pay the taxes on the real estate whether there is any revenue derived from it or not. It is the duty of the trustees to pay the taxes out of the income of the whole property. The widow is entitled to the net, not gross, income.

Traphagen v. Hand.

ALBERT D. TRAPHAGEN et al.

v.

EDWARD S. HAND et al.

The defendant in a judgment which had been paid off but not canceled of record, *bona fide* negotiated a sale of it as a valid judgment to a *bona fide* purchaser for value, without notice, to whom the plaintiff in the judgment assigned it, covenanting that the whole of the money for which it was recovered was due. The holders of a subsequent judgment brought suit to compel cancellation of the judgment, on the ground that it was paid off when the assignment was made.—*Held*, that equity would not aid them, the purchasers having bought in good faith, for value and without notice.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. Whitehead, for complainants.

Mr. J. R. Emery, for defendants Lyon and McCabe.

THE CHANCELLOR.

The complainants are Albert D. Traphagen and the Orange National Bank, judgment creditors of Israel D. Condit and Israel D. Condit, Jr., under judgments recovered by them respectively in the supreme court of this state against the Condits. Mr. Traphagen's judgment is for \$4,141.75, damages and costs, and was recovered November 19th, 1874, and the bank's judgment was recovered July 27th, 1874, and is for \$3,828.88, damages and costs. The object of the suit is to compel the cancellation of two judgments, one recovered against Israel D. Condit and others, May 4th, 1874, by William McDonald for \$2,596.65, damages and costs, and assigned to Thomas B. Peddie, and the other recovered by Samuel W. Torrey, May 6th, 1874, against Israel D. Condit and Israel D. Condit, Jr., for \$7,074.41, damages and costs, and a mortgage for \$3,000, given by Israel D. Condit and wife June 17th, 1874, to Andrew J. Wood, all which judgments and mort-

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gage are apparent liens prior to the judgments of the complainants on the property (or some part of it) of Israel D. Condit, levied on under the executions on the last-mentioned judgments. The controversy is as to the Torrey judgment, which was assigned by Torrey to Lewis J. Lyons, June 22d, 1875, and by Lyons (for the consideration of \$7,610.71, as expressed in the deed) to McCabe, January 31st, 1878. The complainants, by the bill, allege and insist that that judgment was fraudulently assigned to Lyons; that when the assignment was made the judgment had been paid off, and that Lyons paid nothing for the assignment. They allege that the judgment was paid off by mortgages given to Torrey by Francis R. Condit and wife on property in the state of New York, which were accepted by Torrey, May 13th, 1875, in full satisfaction of the judgment, and they also insist that, therefore, the assignment was fraudulent, and that Lyons, when he took the assignment, knew that the judgment had been paid off.

The facts appear to be that on the last-mentioned day, May 13th, 1875, Torrey did accept the mortgages in full satisfaction of his demands against Israel D. Condit, including those on which the judgment was founded, although a final settlement was not made between them until October 6th, 1876. The judgment was never canceled of record. Shortly before the assignment, Israel D. Condit, who owed Lyons's firm (said by the bill to have consisted of Lyons and McCabe) over \$2,000, told Lyons that he could control the judgment and make it the first encumbrance on part of the property on which it was a lien, and proposed to Lyons that the latter should take an assignment of it, to which Lyons agreed. It was agreed between them that the consideration of the assignment should be the amount of the judgment, and out of the consideration Lyons was to deduct the amount of the indebtedness of Condit to his firm, and pay the balance in money; \$1,000 of that balance were to go to Peddie as consideration of a release for the benefit of the Torrey judgment of part of the property on which Peddie's judgment was a lien. That judgment was, as before stated, prior to the Torrey judgment. Lyons took the assignment and paid the money ac-

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cordingly. \$1,000 of the money were paid to Peddie for the release, which, though made to Condit, was not delivered to him, but to Lyons's attorney, who held it for him until the assignment to McCabe, and then held it for the latter. The assignment was made by Torrey at the request of Condit. He appears to have been unwilling to make it until he was assured by counsel that he might safely do so, and only consented on receiving from Condit an instrument of writing to protect him against loss or embarrassment by reason thereof. The instrument recited that he held the judgment as security for an indebtedness of \$20,000 due him from Condit, for which he held the before-mentioned mortgages, and that he was willing to transfer and relinquish the security of the judgment by assigning the judgment to such person as Condit might direct, to enable the latter to raise money thereon. Condit thereby declared that, in case the judgment should thereafter be enforced and collected out of his property, it should not affect Torrey's claim under his mortgages, but that Torrey should hold them and the bonds secured thereby as security for the principal sum of \$20,000 and the interest thereon; he having received no consideration for the assignment of the judgment; and that it was understood that Condit's indebtedness to Torrey was to be in no way affected by the assignment.

The consideration expressed in the deed of assignment was only \$1, but Torrey, by the assignment, not only sold and assigned the judgment to Lyons, but covenanted with him that there was due on it the sum of \$7,031.13 damages, and \$43.38 costs of suit, and that he would not collect or receive that money or any part thereof, nor release or discharge the judgment, but would own and allow all lawful proceedings thereon, Lyons saving him harmless from any costs in the premises. Lyons appears not to have known or suspected (and the same is true of McCabe also) that the judgment had in fact been paid, or that it was not a valid and subsisting security for its full amount. He employed an attorney to attend to the assignment, and placed the money he was to pay in the attorney's hands, in order that he might pay it over for him when he should be satisfied that it might safely be done. The attorney appears to have taken pains

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to satisfy himself as to the title of the property, subject to the judgment and the amount of encumbrance thereon prior to the judgment. He presumed, as he well might, that the attorney who appeared to be acting for the assignor, was indeed acting for and on behalf of Torrey. And he had no suspicion whatever that the judgment was not a valid and subsisting lien, or that it or any part of it had been paid or satisfied, but believed it was a *bona fide* valid security, and that all the money was due on it. Condit, indeed, was acting in the matter, and the money that was paid by Lyons, except the \$1,000 paid to Peddie for the release, went to him; but Torrey also was acting therein, and it undoubtedly was understood by Lyons and his attorney, that by some arrangement or understanding between Condit and Torrey, the consideration which Lyons was to pay for the assignment was, with the exception just mentioned, to go to Condit. But there does not seem to have been any intention on the part either of Torrey or Condit to defraud Lyons or any one else in the matter. As before stated, Torrey acted cautiously and on the advice of counsel, and Condit swears that he thought he had a perfect right to do what he was doing, and that he believed the judgment to be a subsisting valid lien at that time. It would seem, from the recital of the instrument given by Condit to Torrey for his protection, that it was understood between them that notwithstanding Torrey had agreed on the 13th of May, 1875 (the assignment was made on the 22d of June following) to accept the mortgages in satisfaction of (among others) the claims on which the judgment was based, he still held the judgment also as security for the indebtedness of Condit to him. And it appears, from Torrey's testimony, that there was no settlement between them until October of the next year. It appears that on the 6th of the last-mentioned month, he paid Condit the balance due on the settlement which Torrey says was made then, and on that day gave him an order on his, Torrey's, attorney in the judgment for the notes, checks, &c., against Condit in their hands, which they had received from Torrey in March, 1874, for collection. Lyons was a *bona fide* purchaser without notice, for value, not only to the extent of the money he paid, \$1,000 of which

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went as before stated, to release the property on which the complainant's judgments were a lien, from the encumbrance of Peddie's judgment, which was a lien prior to their judgment and to Torrey's judgment, but also as to the rest of the consideration, which was the discharge of an existing debt. *Uhler v. Semple*, 5 C. E. Gr. 288, 293. It is a general and thoroughly established rule that a purchaser *bona fide* for valuable consideration without notice of any preceding claim at law or in equity, will not be prevented by the court of chancery from availing himself of any advantage which he has acquired. 2 *Spence's Eq. Jur.* 733. Or, as Mr. Fonblanque expresses it, such a one "shall not be annoyed in equity." *Fonbl. book 2 p. 147.*

The rule is elsewhere thus expressed: "A purchaser *bona fide* and for a valuable consideration, without notice of any defect in his title at the time he made his purchase, may buy or get in any encumbrance (although it is satisfied); and if he can defend himself at law by it, his adversary shall never be aided in equity for setting it aside, for equity will not disarm a purchaser but assist him; and precedents of this nature are very ancient and numerous, viz., where the court hath refused to give any assistance against a purchaser, either to an heir, or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another." 2 *Sugd. on Vend.* 738. Said Lord Loughborough in *Jerrard v. Saunders*, 2 *Ves. Jr.* 454, "Against such a purchaser this court will not take the least step imaginable." "A purchaser without notice for a valuable consideration," said Lord Northington in *Stanhope v. Earl Verney*, 2 *Eden* 81, "is a bar to the jurisdiction of this court, and it is of no consequence when the legal advantage was acquired, if the purchase was made and the money paid without notice." In *Walkoyn v. Lee*, 9 *Ves.* 24, which was a suit by a tenant in tail in possession under a marriage settlement for discovery and delivery of title deeds, Lord Eldon allowed a plea of mortgage by the tenant for life, alleging himself to be seized in fee and in possession of the premises and deeds as apparent owner, on the rule that equity gives no assistance against a purchaser for valuable consideration without notice. In *Joyce v. De Moleyns*, 2 *J. & L.* 374, the rule was

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applied by Lord Chancellor Sugden. There, the heir-at-law obtained possession of title deeds relating to inappropriate tithes, of which his second brother under the will of their father was tenant for life, and deposited them with bankers by way of equitable mortgage, to secure a sum of money which they advanced him. On a bill filed by the administrator of a bond-creditor of the father for the administration of his estate, and praying that the bankers might be decreed to deliver up the deeds, the bankers insisted that they were purchasers for valuable consideration without notice of the will, or of the title of any persons claiming thereunder, or of the demand of the plaintiff, and submitted that the bill should be dismissed, or that the plaintiff should redeem them. The bill was dismissed, with costs. The chancellor said there was no question as to the right of the persons entitled to the tithes to recover at law, but that he apprehended that the defence of a purchaser for value without notice was a shield as well against a legal as an equitable title. In *Jones v. Powles*, 3 M. & K. 581, where the equitable title of the purchaser, who had obtained the legal title by assignment to him of a satisfied mortgage, depended on a forged will, he was held to be entitled to the protection of the court. And the purchaser of personal property is entitled to the benefit of the rule. In *Dawson v. Prince*, 2 De G. & J. 41, it was applied where a married woman sued for a bill of exchange which had been remitted to her in respect of her separate estate. It was payable to her order. Her husband got possession of it without her knowledge, forged her name on the back of it, then endorsed his own name on it, and gave the bill to the defendant to get it discounted. The defendant got it discounted, but to do so was obliged to endorse it himself. He paid the proceeds to the husband. The acceptor, in consequence of a notice from the complainant, refused to pay the holder, and the defendant was compelled to pay. The suit was brought to establish the complainant's title, and to restrain the defendant from suing the acceptor at law. The other cases illustrating this salutary and characteristic rule of equity are collected in the annotations to the case of *Basset v. Nosworthy*, 2 Lead. Cas. in Eq. 1. In *Wilson v. Hill*, 2 Beas. 143, it was

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held that the assignee for value and without notice of a mortgage illegal and void in the hands of the mortgagee, might enforce it. The rule is observed with strictness, and is clearly applicable to the case in hand. The complainants have had recourse to this court because they are without remedy at law. Their claim is based on their equity to have the judgment declared satisfied, because it was paid, although it was never canceled of record, and was kept on foot by the parties to it after it was in fact satisfied. They would have a clear right to the relief as against Condit and Torrey, but the equity of McCabe, by reason of the fact that Lyons, his assignor, was (as in fact he himself is) a *bona fide* holder of the judgment without notice and for valuable consideration, is superior to theirs. "No one," says Mr. Jeremy, "can have a greater claim or equity to an estate than a *bona fide* purchaser for a valuable consideration without notice of any defect in his title; and it seems also clear that no one can have equal equity with him but a person similarly circumstanced." *Jer. Eq. Jur.* 283.

But, further, the equity of the complainants to have the Torrey judgment canceled was, when Lyons took his assignment, and also when McCabe took his, a latent one, and while the assignee of a chose in action takes it subject to the equities existing between the parties to it, he is not bound by latent equities in favor of third parties, of which he had no notice when he took his assignment. *Reilly v. Mayer*, 1 *Beas.* 55; *Lavalette v. Thompson*, 2 *Beas.* 274; *Murray v. Lylburn*, 2 *Johns. Ch.* 441; *Freeman on Judg.* § 428; *Story on Bills* § 220; *Starr v. Haskins*, 11 *C. E. Gr.* 414. Here, the judgment debtor and judgment creditor together conspired to sell the judgment to Lyons. They concealed from him the fact that it had been paid. Both represented to him that it was a valid security of which no part had been paid. This, Condit did by words and Torrey by his conduct as well as by his assignment, and his solemn covenant therein with Lyons that the whole amount was due. What diligence can protect a purchaser against such a combination? What greater diligence could be required or could be exercised than that which Lyons exercised in this case? There was noth-

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ing to put him on inquiry; and what inquiry could he make? of whom inquire? Condit swears that he thought the judgment was still a valid subsisting security, and Torrey assigned it to Lyons as such. Though a judgment be in fact paid off but not canceled of record, yet if the judgment debtor causes it to be assigned to one who gives value for it, it will be a valid and subsisting security as between them. A mortgage may have been paid, yet on a valuable consideration it may be kept alive for other purposes when the rights of creditors and third persons have not intervened. *Robinson v. Urquhart*, 1 Beas. 515; *Hoy v. Bramhall*, 4 C. E. Gr. 563. In *Crafts v. Wilkinson*, 4 Ad. & El. (N. S.) 74, a judgment was entered for £500 to secure the payment of about that sum, with interest. The debt was subsequently increased to £1,070, and it was agreed between the parties that the judgment should stand as security for the increased debt. Afterwards the defendant sold land which was subject to the judgment, to one who had notice of the agreement. He applied for a rule directing that the judgment be canceled on payment of the amount thereof into court, but the motion was denied. In *Nichols v. Dissler*, 2 Vr. 461, it was held that the title of a *bona fide* purchaser for value, under a judicial sale, the judgment and order for sale remaining in full force and unsatisfied of record, cannot be defeated by parol proof of payment of the debt by the defendant in execution to the plaintiff before the sale. That was an action to recover possession of land which the defendant claimed under a sale to him under a judgment in attachment. The plaintiff offered to prove by parol that the judgment had been satisfied by the payment of a judgment recovered in New York for the same debt for which the judgment in attachment was recovered, and the payment of the costs of the attachment proceedings. The evidence was overruled as incompetent, and the ruling was sustained. Said Chancellor Green, in delivering the judgment of the court of errors and appeals in the cause: "But it is now claimed that the mere payment of the debt or a release given by the plaintiff to the defendant is *ipso facto* a satisfaction and discharge of the record and an abrogation of the power of the court, although the judg-

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ment and the order for sale remain upon the record unsatisfied and in full force. And this offer is made by the defendant in the execution to cancel the record, by the verbal proof of himself and his attorney of a settlement between the parties in New York, and the satisfaction of a judgment more than nineteen years after the transaction occurred, for the defeat of the title of a *bona fide* purchaser for valuable consideration, without notice, upon the faith of that record more than nineteen years ago. In my judgment the rules of law and the sound dictates of public policy alike forbid it." The judgments of the complainants existed at the time the assignment to Lyons was made. The complainants gave no credit to Condit, based on the knowledge or supposition that the Torrey judgment had been paid; for when their judgments were recovered that judgment had not been paid. Nor did they give any credit or extension of time after the delivery and acceptance of the mortgages by Torrey, founded on the knowledge or belief that his judgment was satisfied. One thousand dollars of the money paid by Lyons went to remove so much of an encumbrance prior to that of their judgments. The bill prays that Lyons and McCabe, or one of them, may be decreed to cancel the judgment, if it appears to have been wholly paid, or if paid only partially, that it may be decreed to be a lien only for so much as is unpaid. Obviously, if the proof were never so clear that the judgment had been fully paid previously to the assignment to Lyons, a decree for cancellation could not be granted; for the judgment, if set aside as against the complainants, would still be valid against Condit. And the court ought not, under the circumstances, to aid the complainants by subordinating the lien of the judgment to the lien of their judgments. As to the \$1,000 paid to Peddie for the release, it obviously would be highly inequitable to do so, and as to the rest of the consideration of the assignment as well as that part of it, equity will not deprive McCabe of the advantage he has. The question, it may be added, is not whether the judgment can be enforced by McCabe (though it undoubtedly can be), but whether equity will aid the complainants in their effort to deprive him of the benefit of the judgment. And it is

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enough to say that he is a *bona fide* purchaser for a valuable consideration and without notice, and against such a one this court will not lift a finger. The bill will be dismissed as to Lyons and McCabe, with costs.

LEWIS REED

v.

THE CUMBERLAND MUTUAL FIRE INSURANCE CO.

1. Objections on account of unimportant or immaterial statements or omissions in an answer should be discountenanced.
2. Objection for insufficiency may be taken to the answer of a corporation, or to an answer, oath to which has been waived.

Bill for relief. On motion to strike out part of amended answer.

Mr. J. J. Orandall, for the motion.

Mr. W. E. Potter, contra.

THE CHANCELLOR.

Nine objections are made to the amended answer. The first and ninth together are, that the clause reserving exceptions,

NOTE.—That the answer of an individual, to which oath has been waived, cannot be excepted to for insufficiency, has been held in *Sheppard v. Akers*, 1 Tenn. Ch. 326; nor the answer of a corporation, *Supervisors of Fulton County v. Miss. R. R.*, 21 Ill. 366; *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch. 599.

As to the general effect of complainant's waiving oath to the answer, *Van Dyke v. Davis*, 2 Mich. 151; *Wilson v. Towle*, 36 N. H. 135; *Bartlett v. Gale*, 4 Paige 503; *Lindsley v. James*, 3 Coldw. 477; *Smith v. Potter*, 3 Wis. 432; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Willis v. Henderson*, 5 Ill. 13; *Chambers v. Rowe*, 36 Ill. 171; *Flint v. Jones*, 5 Wis. 424; *Miner v. Medbury*, 6 Wis. 295; *Rainey v. Rainey*, 35 Ala. 282; *Guthrie v. Quinn*, 42 Ala. 561; *Sims v. Ferrill*, 45 Ga. 585; 1 Stew. Dig. 428 §§ 954, 955.—REP.

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the general clause denying combination, the general traverse, and the general profert of proof, are found in the answer, contrary to the provision of the 214th rule. These objections are unsubstantial, and are directed to what is a mere matter of form. It appears by the statement of counsel, that the amended answer was drawn and filed before the existence of the rule requiring that those matters be omitted from answers was made known to them.

The second objection seeks an adjudication on the demurrer to the jurisdiction, contained in the answer. This subject was passed upon in the decision on the objections to the original answer, and on the same grounds on which the objection was overruled then, it must be overruled now.

The third objection is to the denial in the answer of the allegation in the bill that "the complainants are unadvised of the contents of the policy." The matter objected to is immaterial.

The fourth and fifth objections are to that part of the answer which is in response to the claim set up in the bill, that the defendant waived the alleged forfeiture by assessing the complainant on his premium-note. The answer alleges that the note was not kept as a valid security, and denies that the company made the assessment at all, but alleges that by mistake, its clerk included the complainant's name in a list of persons assessed, and sent the list to the company's agent, who received the money from the complainant; but the company, as soon as it discovered the mistake, tendered the money back to the complainant, who refused to receive it. The answer thus fairly raises the question whether there was a waiver or not, and the objection therefore is not well taken.

The sixth objection is to the omission of the defendant to state in the answer what the ruling was which it was stated in one of the letters written by an officer of the company on the subject of the complainant's loss, it was expecting to obtain in a court of law, on the subject of the condition under which it is claimed the forfeiture in this case occurred. The omission is immaterial.

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The seventh is to the statement in the answer that a vote of two-thirds of the directors is required to alter or amend the by-laws. The statement is wholly immaterial.

The eighth is to the statement that because the complainant's buildings were not worth more than \$2,500, he adjusted his claims on the companies in which he had the additional insurance (it was \$2,000 in one and \$1,000 in the other) at sixty per centum thereof. This is stated as evidence that the complainant's claim made in the bill as to the value of the buildings is excessive. It is not objectionable.

The ninth objection has already been referred to and disposed of.

The objections are none of them sustained. Some of them are the same which were taken to the original answer and overruled. The others are unsubstantial and are directed to matter which is of no importance. They will be all overruled and the motion denied, with costs. Where an answer makes full, frank, and explicit discovery of all matters necessary or material to be answered, whether resting in the defendant's own knowledge or on his information and belief, and it is evident that there is no design to evade a full and fair inquiry, exceptions or objections based on slight and unimportant defects, verbal criticisms or immaterial omissions, will be overruled and discountenanced. *Baggot v. Henry*, 1 Edw. Ch. 7; *Reade v. Woodrooffe*, 24 Beav. 421.

And here it will not be out of place to consider the question (not raised on the argument) whether exceptions or objections for insufficiency will lie to an answer, oath to which is waived.

In a note of the case of *Wallace v. Wallace* (in this court July 1828), *Hal. Dig.* 233, it is said that it was held in that case that exceptions for insufficiency to the answer of a corporation will not lie, because the answer is not evidence in the cause, and in *McCormick v. Chamberlin*, 11 Paige, 543, it was said that liberty to except to an answer for insufficiency is never granted where an answer on oath is waived by the complainant's bill. Except the note as to the decision in *Wallace v. Wallace*, there is no evidence of the adjudication of the court in that case. There is no opinion of the court extant, and from the files and

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the clerk's docket it appears that the exceptions were filed to the answer of the Trenton Banking Company; there was an order on the 9th of April, 1828, for leave to take the answer from the files to be sworn to, and it was taken accordingly and returned two days afterwards. The exceptions were filed on the 19th of the same month. They were referred to James Ewing as master, but there does not appear to have been any report, nor is there any further order on the exceptions. The decision of the case in *11 Paige* was based on the 40th rule of the New York court of chancery, which was as follows: "If the complainant waives the necessity of the answer being made on the oath of the defendant, it must be distinctly stated in the bill. When the answer is put in without oath it may be excepted to for scandal or impertinence; but the complainant shall not be at liberty to except thereto for insufficiency. But all material allegations in the bill, which are not answered and admitted, may be proved by him in the same manner as if they were distinctly put in issue by the answer; and if no replication is filed, the matters of defence set up in the defendant's answer will, on the hearing, be considered as admitted by the complainant, although the answer is not on oath." It is quite obvious that the doctrine under consideration disregards the right of the complainant to such answer as the defendant may make in his favor to the statements of the bill. He has a right to the defendant's answer on every material point, though he waives oath. For he is spared the necessity of proof as to all the matters admitted by the defendant. The latter is bound by his admissions in the answer, though put in without oath. *Symmes v. Strong*, 1 Stew. Eq. 131; *Bartlett v. Gale*, 4 Paige 503. And the complainant may avail himself of any allegations therein that tend to establish his case. The complainant's object in waiving oath is merely to deprive the defendant of the advantage of his answer as evidence for himself. Moreover, as a pleading, the answer may be utterly insufficient, as presenting no defence whatever. It is absurd to say that it must, nevertheless, stand as a defence because oath was waived. And if it be doubtful whether the matter set up by the answer constitutes a defence, may not the complainant try it

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before the court to ascertain whether, if it can be sustained by proof, it is a defence or not? Further, on the doctrine under consideration, what control can the court have over the formation of the issue? Is it entirely at the pleasure of the defendant what the issues shall be? Manifestly, the proposition cannot be maintained that exceptions or objections for insufficiency cannot be filed to an answer, oath to which is waived, or to the answer of a corporation.

JACOB SEIGLE

v.

ABRAHAM SEIGLE et al.

A master's report had been duly and regularly confirmed, and a party against whom it was obtained applied to set aside the order of confirmation, to the end that he might except. The order was set aside on terms that the other party have leave (for which he applied) to take further testimony on the subject-matter of the exception.

Mr. Mercer Beasley, Jr., for motion.

Mr. John F. Dumont, contra.

THE CHANCELLOR.

The master's report is in favor of the complainant on the subject of the Abraham Seigle's liability for the rent of the farm, while occupied by his sons, William R. and John Seigle, and it has been confirmed. Abraham Seigle asks that the order of confirmation be set aside, to the end that he may be allowed to except to it on this point; and the complainant on the other hand, asks that, if the motion be granted, the report be returned to the master, with leave to him to take further testimony on the subject. The order of confirmation will be set aside on those terms.

Parker v. Jenks.

JOEL PARKER, receiver &c.,

v.

MARY E. JENKS et al.

Although a deed for lands contains the grantee's personal assumption to pay a mortgage thereon, he cannot be held liable for a decree for deficiency after foreclosure of the mortgage, if it appears that such assumption was not part of his bargain for the purchase of the premises, and that he had no notice of its insertion in his deed.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. F. W. Stevens, for complainant.

Mr. G. T. Parrott, for defendant Day.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage for \$1,200, given by James M. Woodruff and wife to the New Jersey Mutual Life Insurance Company, upon land in Newark, which mortgage is now held by the receiver of that company. The question submitted is whether the defendant Daniel W. Day, who is now the owner of the mortgaged premises, is liable for deficiency. The property was conveyed to him with a tract of land at Summit, in Union county, by Woodruff in 1875. In the deed the latter is declared to be subject to three mortgages, one for \$1,200 to Jonathan Edgar, one for \$2,000 to John Hatfield, and one for \$12,000 to the First National Bank of Morristown, and the former to the mortgage in suit. By the deed the grantor expressly assumed the payment of all the mortgages. By his answer he alleges that he never agreed to assume the complainant's mortgage, and that the assumption in the deed is, so far as that mortgage is concerned, erroneous and contrary to the agreement between him and Woodruff, his grantor. It appears by the testimony of Day, that he did not in the bargain for the

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premises assume to pay any mortgage except that of the bank, and that the consideration of the conveyance was his agreement to pay that mortgage, and to release Woodruff from his indebtedness to him. The bank's mortgage and that indebtedness amounted together to about \$17,000, the amount mentioned in the deed as the consideration. He swears that he did not agree to assume the complainant's mortgage, nor any other mortgage on the property except the bank mortgage; that the deed was drawn for Woodruff by Woodruff's attorney, and was recorded before it came to his, Day's, hands; that he did not read the deed before it was recorded, and he says, substantially, that he never read it or knew that it contained an assumption on his part to pay the complainant's mortgage, until after the commencement of this suit. He is corroborated by Woodruff, who testifies that it was no part of the bargain or agreement that Day should assume the payment of the complainant's mortgage. On this evidence the covenant of assumption would be rectified in a suit for that purpose, and it would be inequitable to enforce it against him in favor of the complainant. A decree for deficiency will be denied.

GARRET S. VREELAND

v.

MARY O'NEIL et al.

The charter of Jersey City (it went into operation in 1871) provides that water-rents for water supplied to the owner or tenant of any lot shall be a lien paramount to any alienation or encumbrance thereof. The complainant's mortgage was given in 1872—*Held*, that he took his mortgage subject to liability to lien, under the charter, for water-rents, for water supplied to the mortgaged premises subsequently, and that they consequently were a lien prior to the mortgage.

Bill to foreclose. On final hearing on bill and answer.

Vreeland v. O'Neil.

Mr. C. H. Hartshorne, for complainant.

Mr. A. L. McDermott, for Jersey City.



THE CHANCELLOR.

This suit is brought to foreclose a mortgage for \$1,600 and interest, given on or about February 16th, 1872, by James O'Neil and wife to the complainant, on land in Jersey City. The bill states that the mayor and aldermen of Jersey City, within the territorial jurisdiction of which municipality the mortgaged premises are, have supplied water on the premises from the water-pipes used by that corporation in the distribution of the Passaic water through the city, which water so supplied was used on those premises by the owners or tenants thereof continuously during the year 1874, and every subsequent year since then; that the corporation, acting through its board of public works, has attempted to assess upon the premises certain impositions or taxes, called water-rents, for the use of that water as before stated, which supposed assessments or impositions were made at or about the dates and for the sums respectively mentioned in the bill; and that the corporation claims that those assessments are liens on the property by virtue of the provisions of its charter; but that the complainant charges and insists that his mortgage was delivered and recorded before any of those assessments were made, and that neither the charter nor any other law gives the power to levy those water-rents on the property in such way as to make them a lien prior to that of the complainant's mortgage, and that if it does, the grant of power is so far unconstitutional and void. The answer admits the making of the assessments, and claims that they are, under the provisions of the charter, liens prior to the mortgage.

The charter was approved March 31st, 1871, and went into operation immediately. *P. L. of 1871 p. 1094*. It was, therefore, in force when the complainant took his mortgage, which was not until February, 1872. It provides (§ 81) that the board of public works shall regulate the distribution and use of the water in all places, and for all purposes where it may be

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required, and shall, from time to time, fix the prices for the use thereof, and the times of payment; and that the owner and occupier of any house, lot or tenement where water shall be taken, shall each be liable for the payment of the price so fixed. It also directs that the board shall fix a sum to be assessed annually on all vacant lots, and lots with buildings on them in which the water is not used, if they are situated on roads, streets, avenues, alleys or courts through or in which the pipes for distributing the water are laid; and that the prices (for the use of the water) and the sums (assessed on property where the water is not used) shall be denominated water-rents. It provides that the water-rents shall, until paid, be liens on the property charged therewith; and for the collection thereof, directs the board of finance and taxation to cause the lands to be sold to raise the water-rents and penalties, and the interest thereon, and costs, charges and expenses of advertising and sale, in the same manner as the board may be authorized by law to sell lands in the city for the payment of taxes thereon; and provides that the proceedings and the effect thereof, shall be the same in all things as if the lands were sold for taxes. It provides also (§ 84) that if the occupier of any tenement or lot on which water-rent may become due while in his occupation, shall refuse or neglect to pay it when due, the owner may pay it, and when, as between them, the occupant ought to pay it, recover it of him, with the penalties and interest, by action or distress. The provision of the charter (§ 151) for the collection of unpaid taxes and assessments by sale of the property, declares that they shall be and remain a lien on the land, tenements or real estate on which they are assessed or made, from the time of the confirmation thereof until paid, notwithstanding any devise, descent, alienation, mortgage or other encumbrance thereof; and it provides for sale, and for redemption after sale by the owner or encumbrancers. Under this provision the lien is superior to the complainant's mortgage. *Paterson v. O'Neill*, 5 Stew. Eq. 386.

When the complainant took his mortgage the charter gave to the municipal authorities a lien for the collection of the rents for the water which should be supplied by the city to the owners

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or occupants of the property. He took his mortgage subject to the liability to that lien, and the methods prescribed by the legislature for enforcing it. While in *Jersey City v. Vreeland*, 14 Vr. 638, it was held that the assessments of water-rates on vacant lots and other property where the water is not used, are illegal, because the amount of tax imposed is determined by rates adopted by the board of public works in its discretion, without regard to special benefits or valuations, in the same case in the supreme court it was said that from the use of the water on the property, an obligation to pay the water-rent would result; that the act of the owner in taking the water would raise an implied promise on his part to pay the price fixed for such taking. *Vreeland v. Jersey City*, 14 Vr. 135. There is nothing before me to bring into question the legality of the assessment in this case on any ground except that of the unconstitutionality of the provisions which give the city a lien superior to the lien of the mortgage for the price of water supplied to the owner or occupant of the property, after the giving of the mortgage. By the provisions under consideration the legislature has given to the city the means of collecting, by lien upon the premises to which the water is supplied, superior to all encumbrances thereon, the price of the water supplied for use on the premises. The complainant, who took his mortgage after the provision went into operation, clearly has no right superior to that of the owner; and if the provision is valid against the latter, it is also against him. There does not appear to be any constitutional objection to the lien as against the owner. The legislature has power to give the city a lien upon his property for the collection of the price of water supplied to him for use there, and unless the manner of fixing the price is objectionable as subjecting him or his property to arbitrary assessments to which of necessity he must submit, whether just or unjust (which would be subversive of his rights of property), the regulation is not unconstitutional. Here the legislature has established a municipal board, with power to fix the price at which water is to be supplied to his property. He is under no legal necessity (and no actual one, so far as appears) to take the water, and if he chooses to take it

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under the circumstances, he has no ground of complaint; no right of his is infringed. In taking the water from the city under the provision, he agrees to take it at the price fixed by the board. The mode of fixing it is not drawn in question here. There is no evidence on the subject, nor does it appear whether it is fixed before the water is supplied, or afterwards. The city's lien is paramount to that of the complainant's mortgage.

MARSHALL JEWELL

v.

THE INHABITANTS OF WEST ORANGE, in the county of
Essex, et al.

1. A complainant filed a bill for strict foreclosure against a township which claimed under a sale of the premises for taxes, and stated that he bought and held the premises as trustee for a partnership composed of himself and two other persons, whom he made defendants.—*Held*, that they should be made complainants instead of defendants.

2. This court has no jurisdiction to try the validity of assessments of taxes or of the certificates of sales of lands thereunder, where they are attacked for irregularity, or because the lien had expired before the sale was made, or because the sale was made for taxes on the land sold, blended with taxes on personalty.

Bill for relief. On demurrer.

Mr. J. W. Taylor, for demurrants.

Messrs. J. W. & J. K. Field, for complainant.

THE CHANCELLOR.

This suit is brought by Marshall Jewell, as owner of certain land in the township of West Orange, in the county of Essex, for strict foreclosure. He was the purchaser of those premises at

Jewell v. West Orange.

master's sale, under an execution issued out of this court in a suit brought in 1878 by Daniel F. Appleton, for foreclosure and sale thereof. That suit was brought upon a mortgage given in 1867. Other subsequent mortgage encumbrancers were made parties, but the township, which held certain claims for taxes against the property, was not. Those claims were for taxes assessed in 1873 and 1874, and for which the property was sold in 1877 to the township, which holds certificates of sale for it, but no declaration of sale. The bill alleges that the taxes were illegally assessed, and that the sales therefor are illegal and void. It prays that it may be decreed that the assessments, with all the proceedings of the township to enforce or collect them, are utterly null and void, and that the assessments and the certificates of sale are no lien or encumbrance on the property; and also that the township has no claim or title of any kind on the property by reason of the assessments, or any of them; and that it may be decreed that the township redeem by paying the complainant the amount due for principal and interest on the three mortgages (the first of which was given in 1867, as before mentioned, and the other two in 1871) foreclosed, with the costs of the Appleton foreclosure suit. The township demurs on two grounds, want of parties and want of equity.

As to the first-mentioned ground. The complainant states in the bill that he bought the property as trustee for his business firm, consisting of himself and Pliny and Charles A. Jewell, and he also says in the bill that the last-mentioned two persons may claim to have some right, title and interest in the property, but he does not deny the claim. He makes them defendants to the bill, though he does not claim adversely to them in any way, but files the bill in their interest as well as his own. He should have made them complainants with him instead of defendants.

As to the other ground, want of equity. The bill is filed in a double aspect; in the first place, to try the validity of the assessments and sales with a view to clearing the complainant's title therefrom, and failing that, in the next place, to compel the township to redeem. The bill alleges that the assessments are invalid, and the sales null and void, not only for irregularity,

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but also because when the sales were made the lien for the taxes had expired, and also because the land was sold to pay taxes, which consisted of assessments on personal property as well as taxes assessed on the land sold, which taxes were blended together. It is a settled law that this court has no jurisdiction to try the validity of the assessments or of the certificates of sale on such grounds. *Lewis v. City of Elizabeth*, 10 C. E. Gr. 298; *Dusenbury v. Newark*, Id. 295; *Jersey City v. Lembeck*, 4 Stew. Eq. 255; *Cleveland v. Road Board*, Id. 473; *Smith v. Newark*, 5 Stew. Eq. 1; *S. C. on appeal*, 6 Id. 545. If the assessments and sales are valid the complainant cannot call upon the township to redeem, for its title is paramount to that of the mortgages under which he claims. The provisions of the act under which the assessments in question were made (*P. L. of 1871, p. 367*), in reference to the assessment of taxes, the lien of the taxes, and sales for non-payment thereof, are similar to those of the charter of the city of Trenton, under which it was adjudged that the lien of the taxes was paramount to that of a mortgage made before the assessment. *Trustees &c. v. Trenton*, 3 Stew. Eq. 667. The demurrer will be allowed.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
COMPANY OF THE CITY OF PHILADELPHIA,

v.

THE UNITED NEW JERSEY RAILROAD AND CANAL
COMPANY et al.

Provision for the payment of bonds secured by a mortgage on defendants' railroad was made by agreement that the defendants should deposit a fixed amount of money annually, as a sinking fund, with the complainant as trustee, and the bonds themselves prescribed that the sinking fund should be invested in certain other specified bonds of the defendants.—*Held*, that the court would not, in the absence of the bondholders, direct the trustee to invest the sinking fund

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in other bonds of the defendants than those specified as secured by the same mortgage, but bearing a lower rate of interest, merely because the bonds required by the terms of the trust could only be purchased at a premium.

Bill for directions to trustee. On final hearing on bill and answers.

Mr. B. Gummere, for complainants.

Mr. J. D. Bedle, for United Companies.

Mr. E. T. Green, for Pennsylvania R. R. Co.

THE CHANCELLOR.

The bill is filed by a trustee for directions as to investing certain funds in its hands as sinking funds for certain bonds issued by the United New Jersey Railroad and Canal Company. Those bonds are of three issues, one dated March 1st, 1869, of one thousand eight hundred and forty-six bonds for £200 each, amounting to £369,200, with interest at six per cent. per annum; another dated April 25th, 1871, of one thousand eight hundred bonds, for \$1,000 each, amounting to \$1,800,000, with like interest; and the other dated May 1st, 1871, of two thousand bonds, for \$1,000 each, with like interest. All the bonds are payable in 1894. As security, the company agreed with the

NOTE.—Courts of equity possess the power to change the investments or character of property of beneficiaries, and may direct trustees and guardians to do so, *Snowhill v. Snowhill*, 2 Gr. Ch. 20, [see 3 C. E. Gr. 350]; *Ware v. Ware*, 2 Hal. Ch. 117; *Calmes's Case*, 1 Hill Ch. 112; *Webb v. Shaftsbury*, 6 Madd. 100; *Robinson v. Robinson*, L. R. (10 Irish Eq.) 189; *Dodge v. Cole*, 97 Ill. 338; *Hager v. Hager*, 3 Desauss. 18; *Williams v. Harrington*, 11 Ired. 616; but see *Berry v. Rogers*, 2 B. Mon. 308; *Baker v. Lorillard*, 4 N. Y. 257; *Faulkner v. Davis*, 18 Gratt. 651; *Williams's Case*, 3 Bland 186; *Rogers v. Dill*, 6 Hill 415.

The courts regard the interest of the immediate beneficiary rather than contingent or remote interests, *Salisbury's Case*, 3 Johns. Ch. 347; *Steele's Case*, 4 C. E. Gr. 120; *Heaton's Case*, 6 C. E. Gr. 221; and will not convert or transfer or change secure investments unless obviously advantageous, *Sadler v. Turner*, 8 Ves. 617; *Douglass v. Caldwell*, 6 Jones Eq. 20; *Barry v. Marriott*, 12 Jur. 1043, 2 De G. & Sm. 491; *Howe v. Dartmouth*, 7 Ves. 137; *Boyce's Case*, L. R. (1 Irish Eq.) 45, (2 Irish Eq.) 255; *Davis's Case*, 14 Allen 24;

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bondholders of each issue, at the time of issuing the bonds, that it would provide a sinking fund for their redemption at maturity, by the payment, annually, of a specified sum of money to the complainant in trust; the money so paid, to be held and invested by it and the interest compounded. This agreement was incorporated in the bonds. The agreements for the two issues first mentioned (the loan of 1869 and that of 1871, for \$1,800,000) provide that the investments shall be made in the loan or any loan of the United Companies or either of them theretofore issued or in lawful securities; and the agreement for the other, provides that the investments be made in that loan or any loan of those companies or either of them, or in lawful securities. The bill states that the complainant will receive on the 1st day of February, 1883, from six per cent. bonds then payable, in which it has invested the sinking funds, \$396,900; and will have in hand on or before the 1st of April, 1883, \$147,370 more from payments on account of the sinking funds and interest on investments, altogether, \$544,270; that it is now, and has been for some time past; impossible to purchase any of the bonds of the United Companies maturing in 1894, without paying a premium of at least twelve per cent. therefor; and that it would be impossible to purchase any large amount of those bonds without thereby greatly increasing the market price; that it is impossible to purchase six per cent.

Jewett's Case, 16 Ala. 409; *Talley v. Starke*, 6 Gratt. 339; see *Gary v. Cannon*, 3 Ired. Eq. 64.

Especially will the court hesitate in directing a change of investments when the instrument creating the trust confers no such power on the trustees, *Murray v. Feinour*, 2 Md. Ch. 418.

What alterations in the condition of the estate or investments, or in the situation of the parties, will justify the intervention of the court as to changing prescribed investments, *Boss v. Godsall*, 1 Y. & C. Ch. 617; *Wedderburn's Trusts*, L. R. (9 Ch. Div.) 112; *Perronneau v. Perronneau*, 1 Desauss. 521; *Crawford v. Creswell*, 55 Ala. 497; see *Wilkinson's Estate*, L. R. (9 Eq.) 343.

Where the consent of a person named in the trust-deed is a prerequisite to a change of the investment of the trust fund, the court will not remove him for refusing to consent thereto, *Vanderbill's Case*, 20 Hun 520; see, also, *Lee v. Young*, 2 Y. & C. Ch. 532; *Beauclerk v. Ashburnham*, 8 Beav. 322; *Plympton v. Plympton*, 6 Allen 178.—R.M.P.

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government securities or any other securities of the class known as legal securities, without paying such a premium as to reduce the average interest secured thereby, to at most four per cent; that the United New Jersey Railroad and Canal Company, in order to take up the maturing bonds before mentioned, propose to issue on the 1st day of February, 1883, bonds to the amount of \$1,824,000, bearing interest at the rate of four per cent. per annum, and maturing forty years from date, and to be secured by the lien of a mortgage given by the United Companies to the complainants dated April 20th, 1871, which bonds can be purchased now at the rate of ninety-three and a-half cents on the dollar; and that in the present condition of the money market, such investment of the \$544,270, is the most advantageous that can be made, and that in the future it may also be more advantageous to invest in other bonds now or hereafter to be issued secured by that mortgage. The bill prays that this court will grant authority and permission to make such investment of such present and future moneys.

The payment of all the bonds of the three issues before mentioned of 1869 and 1871, respectively, is secured by the mortgage of 1871. In the bonds of the issue of 1871, the fact that they are so secured is stated. The mortgage is made to secure indebtedness created and which may be created to an amount not to exceed \$20,000,000. When the provision for a sinking fund was made for the issues of 1871, the fact that those bonds were secured by that mortgage was in contemplation of the parties, and yet, as to one of the issues, the provision was made that the investments for the sinking fund therefor, should be made in bonds either of that loan or any *previous* one.

It is the rule that the directions for investment contained in an instrument of trust are imperatively obligatory on the trustee; but by the direction of a competent court, he may depart from them. The court, however, should exercise its authority in such cases only in view of the existence of a necessity. The power of this court to abrogate or annul any of the terms of the before-mentioned agreements, should not be exercised except for clear and cogent reasons, and with full opportunity to the parties who

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are to be affected by such action to be heard. The bondholders are entitled to the advantage of the agreements as made on the issuing of the bonds, and it is not proper for this court to substitute its own judgment for their business arrangements, unless it clearly appears to be necessary. To warrant such interference in so delicate and important a matter, it must appear indisputably that an occasion has arisen which calls for its action. It may, indeed, be for the advantage of the bondholders that the trustee be empowered to disregard the directions of the instrument of trust, in reference to the issue of 1869 and one of those of 1871, and invest in bonds not of the same issue as those the payment of which the sinking fund is designed to provide for, or in those of prior issues, but in bonds of subsequent issues. But to give such authority would manifestly nullify a part of the agreements on the faith of which those bonds were purchased and are held. The holders of the bonds have every reason to expect that this court, not only will not nullify those agreements, except in view of the existence of a necessity for doing so, but will uphold them. The law, as before stated, holds trustees to a strict observance of the directions for their guidance contained in the instrument of trust, and the cases recognize the sacredness of the right of the creditor of the trust to give such directions on the subject of investments as to him shall seem best, and the reluctance of the court to authorize a departure therefrom. In *Wood v. Wood*, 5 Paige 596, Chancellor Walworth said that where the testator has directed the trust fund to be invested in the purchase of land in a particular place, and required the trustee to apply the rents and profits for the use of the *cestui que trust* during his life, or for any shorter period, this court may, with the assent of all persons who have either vested or contingent interests in the fund or in the lands to be purchased therewith, authorize the trustee to invest the fund in lands or other real estate in another place, upon the same trusts. And if any of the persons who are thus interested are infants, and within the jurisdiction of the court, the chancellor may assent to such a change of investment in their behalf. In *Burrill v. Sheil*, 2 Barb. S. C. 457, where a testator, by his

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will, directed that investments be made in England, it was held that the court had no power to divert the investment from that country, and to direct it to be made here, except with the assent of all the persons interested therein, and therefore, inasmuch as some of them were infants, and not within the jurisdiction, the order was denied. Mr. Perry, in his work on Trusts, lays it down as a rule, that if an investment in a particular fund or stock is directed by a testator, it cannot be varied except by the consent of all the parties interested; and if there are parties not *sui juris*, or not in being, the court itself will not order a change. *Perry on Trusts*, § 466. In the case before me, the trustee is complainant, and the defendants are the obligor and its guarantor. The bondholders, except as they may be said to be represented by the trustee, are not represented at all. It is highly probable that it is impossible to bring them before the court except by representation, but that fact would only tend to make the court still more careful and still more reluctant to destroy any part of the agreement on which they may rest. It appears from the bill that the results of investment in the securities designated in those bonds which provide for investment in the bonds of the same issue or of prior issues, will be practically the same, or nearly so, as the investment in the four per cent. bonds of the issue about to be made. Conceding that it will be less productive, that fact is not enough to induce this court to assume the responsibility of saying, for absent bondholders, that it is their interest to annul a provision carefully made, and which they, perhaps, value as an important element of security. Nor can the bondholders be regarded as being represented by the trustee for the purposes of this application. The trustee recommends the change, but the bondholders might not concur. It is enough to say that I do not perceive, in the facts submitted, the existence of such a condition of circumstances as to warrant me in assuming the responsibility of giving the desired direction, and thus disturbing the contract made by the parties for securing the payment of the bonds; and that such action should not be taken, except in case of necessity, in the absence of the bondholders.

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AUGUSTUS TRIMMER

v.

THE PENNSYLVANIA, SLATINGTON AND NEW ENGLAND
RAILROAD COMPANY.

Where an injunction is issued against a corporation, the officers, who neither do anything in violation of it, nor by concealment of the fact that it has been issued, conduce to such violation, cannot be held liable for a breach of it.

On bill for relief. On motion on the part of Frank M. Ward and Jacob C. Van Horn to set aside attachment for contempt against them, and motion on the part of the complainant for a like attachment against Nathaniel S. Rue, president of the defendant.

Mr. J. G. Shipman, for the motion.

Mr. John Linn and *Mr. Lewis J. Martin*, contra.

THE CHANCELLOR.

This suit was brought in September, 1882, to restrain the defendant, a railroad company of this state, from occupying the land of the complainant until it should have paid or tendered to him compensation. It was building thereon a pier for a bridge across the Delaware river. A preliminary injunction was issued in pursuance of the prayer of the bill, directed to the company and its officers and agents, and it was served on the president, Mr. Nathaniel S. Rue, on the 3d of October, 1882. It was previously, and on the 29th of September, served on Earl and Tanner, two persons who were engaged in the work of building the pier on the complainant's land. The work was not stopped, but on the contrary, the mandate of the court was flagrantly violated, for which offence proceedings against Earl and Tanner have been taken. Three others of the directors, besides the president,

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(Mr. Ward, Mr. Schanck and Mr. Van Horn) had knowledge of the existence of the injunction. Motion was made on due notice to attach the president and Messrs. Ward and Van Horn for contempt in disobeying the injunction. They did not, nor did any of them, appear at the time fixed for hearing in the order to show cause granted on that motion, and the order was made absolute as to Messrs. Ward and Van Horn, and the attachment was issued, but it has not been served. They now move to set aside the order and attachment, and application is also made on behalf of the complainant to make the order to show cause absolute against the president. The reason given for the non-appearance of Messrs. Ward and Van Horn at the time fixed for hearing, in the order to show cause, is entirely satisfactory. They supposed, and had reason to believe, that the hearing had been postponed on application of their counsel. To consider the merits: neither the president nor either of the three other directors before mentioned appears to have done anything in violation of the injunction. The president, as soon as the writ was served on him, notified the contractor, Stanton, to stop work on the complainant's land at once, and wrote to the attorneys of the company, enclosing the copy of the writ he had received, and requested them to attend to the matter. It appears, it may be remarked, that Stanton had sublet the contract to one Danforth, and at the request of the latter, and with Stanton's consent, the contract was in form made between the company and Danforth. It is urged on behalf of the complainant that the president and those of the directors who had knowledge of the existence of the injunction were bound to do what they could to compel obedience to it. An injunction against a corporate body is binding upon all the individuals acting for the corporation to whose knowledge it comes. *People v. Sturtevant*, 9 N. Y. 263; *High on Inj.* § 863. In *Bank Commissioners v. City Bank of Buffalo* (1843), cited in 1 Barb. Ch. Prac. 636, it was decided by Chancellor Walworth that where an injunction against a corporation is served upon its president, it is his duty to prevent the other officers of the corporation from doing anything contrary to the order of the court; and that if he conceals from such officers

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the fact that an injunction has been served upon him, and allows them to go on and do acts in violation of it, it is a breach of the injunction on his part. In the case in hand, however, none of the officers of the corporation did anything, so far as appears, in violation of the command of the court. The president supposed that his orders to stop the work had been obeyed, and in the sequel was surprised to find that they had not been. Mr. Van Horn knew nothing of the injunction until the 17th of October, and then became apprised of it by the service upon him of the order to show cause. Mr. Ward was apprised of the injunction by the president, but he not only does not appear to have done anything in violation of it, but on the other hand, with the treasurer (a lawyer), who was also a director, advised that it must be strictly obeyed. He swears that if he failed in doing his whole duty toward the court in the matter, it was merely through want of knowledge of what his obligations in the premises were. The attachment and the order for it will be set aside, but without costs, and the order to show cause as against the president and Messrs. Ward and Van Horn will be discharged, also without costs.

NEHEMIAH O. PILLSBURY, assignee &c.,

v.

JANE A. KINGON.

The complainant acted as the mutual friend of the defendant and her father in effecting the exchange of a dwelling-house in Brooklyn owned by the defendant, for a store and a dwelling-house in Montclair, owned by her father (the latter occupied as his home), especially in fixing the relative values of the properties and the basis for their exchange, and urged it as advantageous to both parties. The father was about to make an assignment for the benefit of his creditors, and the complainant was at that time suggested as and he expected to be the assignee. The exchange was made on December 16th, 1877, and the assignment (which was made to the complainant) was

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made on January 14th, 1878. The defendant took possession of and occupied the Montclair property at once, her father also living there with her; and after the assignment she expended about \$2,000 in improvements thereon, as complainant then knew." Learning that her father's creditors were dissatisfied with the exchange, the defendant and her husband offered to re-exchange, if paid for her improvements, but the complainant, then assignee, did not accept the offer. The complainant, as assignee, collected the rents from the Brooklyn property, but allowed the taxes and interest on the mortgages thereon to remain unpaid, and the premises were afterwards, under foreclosure, to which the complainant was a party, sold to a third person.—*Held*, that the complainant was not entitled to a decree setting aside the exchange as fraudulent against the father's creditors, and that while his conduct in the exchange before the assignment, did not (of course) bind the creditors whom, as assignee, he represented in the suit, yet it showed that the exchange was made in good faith.

Bill for relief. On final hearing on pleadings and proofs.

Mr. F. Adams, for complainant.

Mr. J. H. Ackerman, for defendant.

THE CHANCELLOR.

This suit is brought by Nehemiah O. Pillsbury, as assignee of John C. Doremus (now deceased), under the act "to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," originally against Jane A. Kingon and her husband (but he is now dead), to set aside an exchange of properties made December 16th, 1877, by and between Mr. Doremus and Mrs. Kingon, his daughter. Mr. Doremus's property consisted of his homestead and store (two different places) in Montclair, in Essex county, and Mrs. Kingon's was a brown-stone front three or four-story house in Brooklyn. The Montclair property, at the time of the exchange, was mortgaged for \$8,000, and the Brooklyn property for \$5,000. The former property was in the exchange valued at \$12,000, and the latter at \$11,000. For the difference Mr. Doremus gave Mrs. Kingon a mortgage for \$2,000 on the Brooklyn property. Mr. Doremus made an assignment to Mr.

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Pillsbury, the complainant, for the equal benefit of his creditors, January 14th, 1878, about a month after the exchange. The bill claims that the transfer of the Montclair property to Mrs. Kingon was fraudulent as against the creditors of Mr. Doremus, that it was made in view of the intended assignment, and in fraud of it, and was designed to protect the property of Mr. Doremus from his creditors. He died December 28th, 1879. Immediately after the exchange Mrs. Kingon took possession of the Montclair property (the deeds were recorded within a very few days after the exchange was made), and continued thenceforward to occupy it as owner. She made necessary and valuable improvements to the homestead at a cost of about \$2,000. After the assignment the complainant took the rents of the Brooklyn property, but paid neither principal nor interest on either of the mortgages thereon, nor the taxes on the property. He knew all about the exchange and the circumstances thereof. He was the confidential friend of Mr. Doremus, and appears not only to have advised him in the matter, but to have strongly favored the exchange and to have urged it on both parties; on Mr. Kingon as being the means of aiding his father-in-law by securing to him in his old age a home in the homestead with his daughter, and on Mr. Doremus as being not only advantageous to him, but to his creditors also. It appears by the evidence that the complainant did much towards fixing the price at which the properties were taken in the exchange. In September, 1878, and before the Brooklyn property was sold under foreclosure as hereinafter mentioned, Mr. and Mrs. Kingon (the assignee was appointed in January preceding) having learned that the creditors of Mr. Doremus were dissatisfied with the exchange, through their attorney offered the complainant to convey the Montclair property to him, on receiving from him a conveyance of the Brooklyn property and payment for the improvements they had put on the former; but the offer was not accepted. The first mortgage on the Brooklyn property was foreclosed by suit because of non-payment of interest, and the property was sold September 27th, 1878, to Duncan D. Chaplin. To that suit the complain-

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ant was a party. After the sale, and on the 1st day of October following, he filed the bill in this cause.

Mrs. Kingon gives the history of the exchange. On the 1st of October, 1877, she and her husband were residing in the city of New York. On that day she was called by a telegram to Montclair to see her mother, who was very ill. She went there to stay a week, but after the week remained there on account of her mother's illness. Her husband followed her, and they were still living with her father and mother in the homestead in December following, when her mother spoke to her about coming there to live with them, and her father proposed to her husband to buy the homestead, which proposal was not accepted; Mr. Kingon saying he had New Jersey property enough. A short time afterwards they again spoke of the matter, and on that occasion the complainant and Mr. Van Gieson, her father's lawyer, were also present and took part in the conversation. An exchange of the Brooklyn for the Montclair property was then talked about, and also the subject of an assignment which her father proposed to make of his property for the benefit of his creditors; and it appears that it was contemplated that the complainant should be the assignee. She says the Brooklyn property was worth as much as the Montclair property; that her father said he would not make any transfer unless it gave his creditors as much as if he retained the Montclair property; that her husband suggested that the complainant should go and look at the Brooklyn property, and the latter promised to do so; that her father knew that property well; that he had often been there; that an appointment was then made for the complainant to meet her husband at the office of the latter in New York the next day; that her father held his property at a price higher than that at which the complainant and Mr. Van Gieson estimated it, and that the price of the Brooklyn property was fixed by the complainant, and that of the Montclair property by the complainant and Mr. Van Gieson. Mr. Van Gieson testifies that Mr. Kingon, speaking for his wife, was somewhat loth to make the exchange. He says the impression he got from the conversation at the time was, that Mr. Kingon was under the convic-

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tion that he was not getting value in the exchange of properties. He further says that the complainant was very much in favor of the exchange, and advised it as a friend; that it was urged on Mr. Kingon in this way to provide a home for Mr. Doremus in Montclair. (his wife was ill and died three days after the exchange); that the complainant advised an exchange of the properties, pointing out among other things the advantage of Mr. Doremus having a home in Montclair; that the idea, as he understood it, was that Mr. and Mrs. Kingon would reside in Montclair; that they contemplated a residence there, and that Mr. Doremus, who much preferred residing there to living in a strange place, should have a home with them. It also appears from his testimony that the complainant said, though perhaps not at that time, that the exchange would be beneficial to the creditors of Mr. Doremus; that the Brooklyn property, which would pass to him as assignee when the assignment should be made, was worth more to the creditors than the Montclair property. While the complainant as assignee—in his representative capacity—is not bound by these statements or actions of his in the exchange, they are competent and important evidence of the character and design of the transaction, and go very far, indeed, to repel the idea of the existence of any fraudulent intent. He was acting as the friend and adviser of Mr. Doremus, and, to a certain extent, of Mr. and Mrs. Kingon also. Both parties appear to have had great confidence in his judgment and candor. The exchange was not made secretly or hastily, but after full negotiation and consideration, and with care and circumspection, and as soon as it was made the deeds were put on record. The proof is that the Brooklyn property was valuable, the situation and neighborhood very good, and the house well built. It was rented for \$600 a year. One of the witnesses speaks of its contiguity to Prospect Park as an element of value. The witnesses who give their opinion of its value at the time of the exchange, vary in their estimates, one fixing it at about \$7,000, another at from \$7,500 to \$8,500, and another at \$10,000. It is to be remembered in connection with these estimates, that when the exchange was made it had been mort-

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gaged for \$10,000, \$5,000 of which had been paid, and that the complainant in his inventory valued it at \$10,000. He says, however, that it was on the representations of Mr. Kingon, but Mr. Kingon is dead, and it appears that the complainant, at the time of the exchange, took pains to inform himself of the value of the property, and, to say the least of it, did very much towards fixing the price at which Mr. Doremus took it. As to the Montclair property, the witnesses vary in their estimates of its value. The complainant estimates the value of the homestead at \$8,000, another witness at \$9,000, and another at \$10,000. They also vary in their estimates of the value of the store. The complainant and another witness fix it at \$5,000, and another at \$6,000. On the other hand, on the part of the defendant, Mr. Van Gieson puts the value of the homestead at from \$4,000 to \$5,000, and that of the store at \$3,000; and Mr. Van Riper values the homestead at from \$7,000 to \$8,000, and the store at from \$3,000 to \$4,000. When the exchange was made it was at a time of stagnation in the real estate market, and consequent depression in values. There is no proof of any fraudulent design on the part of Mrs. Kingon, nor is any to be imputed to her. But further, the improvements which she made to the Montclair property were put upon it after the assignment was made, and the assignee had knowledge that she was spending her money on the property in those improvements. He admits that they were in progress to his knowledge while he was contemplating bringing this suit. In September, 1878, she proposed to him to convey the property to him on condition that he would convey the Brooklyn property to her and pay her for those improvements, but he practically rejected the proposition by giving no reply to it. He made no effort to sell the Brooklyn property, though it appears that he might have sold it; for Mr. Carman testifies that in the spring 1878 inferior properties in the same neighborhood were sold at private sale at \$8,000 apiece, and he says that the property in question was better worth \$10,000 than they \$8,000. Having got all the rent he could from the Brooklyn property, paying neither taxes nor principal or interest of the mortgages, the complainant let the first mortgage on it go to foreclosure and sale, and then, after

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the property had been sold under the foreclosure, began this suit. It is clear that the creditors have no claim to any relief in equity. The bill will be dismissed, with costs.

LYDIA A. CLARK

v.

HENRY M. DENTON et al.

A testator appointed "my beloved wife, Lydia Ann Clark, executrix, and my friends, William A. Lewis and ——— ———, both of Jersey City aforesaid, executors of this my last will and testament, to which said executrix and executors, the survivors and survivor of them, I commit the proper administration of my estate, the execution of the powers and the discharge of the duties herein imposed." He also gave them a general power to sell any part of his real estate; appointed his wife one of two designated trustees for certain beneficiaries therein named, under bequests which were imperfect, and made other imperfect bequests. On April 16th, 1881, Mrs. Clark resigned as executrix and was discharged by the orphans court. On April 27th, 1881, Lewis sold part of the lands, and some of the lots were bought by Mrs. Clark. —*Held*, that the power of sale was absolute and for conversion independently of the trusts; that by the discharge of Mrs. Clark as executrix, the power of sale, by statute, devolved on Lewis, and that she had a right to buy at the sale, and her title was not affected by her retaining her trusteeship, nor by the incomplete bequests; and she having sold part of those lots to the defendants, the court compelled them to accept a deed therefor, on a bill for specific performance.

Bill for specific performance. On final hearing on pleadings and proofs.

Messrs. Collins & Corbin, for complainant.

Messrs. Vredenburg & Garretson, for defendants.

THE CHANCELLOR.

This suit was brought to enforce the specific performance of an agreement made February 1st, 1882, between the complain-

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ant and the defendants, by which the former agreed to sell and convey to the latter, for the consideration of \$9,000, four lots in Jersey City, part of the real estate conveyed to the complainant by William A. Lewis, executor of her late husband, Hosea T. Clark, deceased, by deed dated April 30th, 1881, and duly recorded. Of the price to be paid by the defendants \$100 were to be, and were in fact paid at the execution of the agreement, and the balance was to be paid on the 1st day of May, 1882, with interest at six per cent. per annum from the 1st day of March in that year. The complainant reserved the right to remove off the land any buildings which were thereon at the time of the sale, and the defendants were to have the right to enter on the property on the 1st of March, 1882, and thence forward possess it and tear down any buildings on it, and build on it themselves. The deed, which was to be with full covenants and general warranty, was to be delivered on the 1st of May, when the \$8,900 (and the interest thereon) were to be paid.

The defendants have built on the property. They refuse to accept the deed for it from Mrs. Clark, on the ground that she cannot thereby give to them a good marketable title. Her title comes from the estate of her deceased husband, one of whose executors she was, and she bought the land in question with other land at a public sale held by Mr. Lewis, as executor, April

NOTE.—A trustee or executor cannot buy the trust property at a public sale made by a sheriff, master or other officer, *Staats v. Bergen*, 2 C. E. Gr. 297, 554; *Callis v. Ridout*, 7 Gill & Johns. 1; *Bell v. Webb*, 2 Gill 163; *Spindler v. Atkinson*, 3 Md. 409; *Conger v. Ring*, 11 Barb. 356; *Van Epps v. Van Epps*, 9 Paige 237; *Beeson v. Beeson*, 9 Pa. St. 279; *Roberts v. Moseley*, 64 Mo. 507; *Forbes v. Halsey*, 26 N. Y. 53; *Rogers v. Rogers*, Hopk. 515, 3 Wend. 503; *Martin v. Wynkoop*, 12 Ind. 266; *Campbell v. Johnson*, 1 Sandf. 148; *Jewett v. Miller*, 10 N. Y. 402; *Campbell v. Penna. Ins. Co.*, 2 Whart. 53; or at an auction, *Sanderson v. Walker*, 13 Ves. 601; *Lawrence v. Glasworthy*, 3 Jur. (N. S.) 1049; *Michoud v. Girod*, 4 How. (U. S.) 503; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Bellamy v. Bellamy*, 6 Fla. 62; *Piatt v. Longworth*, 27 Ohio St. 159; *Elliott v. Pool*, 3 Jones Eq. 17; *Hoitt v. Webb*, 36 N. H. 158; *Glover v. Ames*, 8 Fed. Rep. 351.

But a guardian *ad litem* and an administrator have been held not to be within the rule, *Jackson v. Woolsey*, 11 Johns. 446; *Meador v. Hamilton*, 27 Pa. St. 137; *Roberts v. Roberts*, 65 N. C. 27; *Prevost v. Gratz*, Pet. C. C. 364; *Fisk v. Sarber*, 6 W. & S. 18; *Earl v. Halsey*, 1 McCart. 332; *Mulford v.*

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27th, 1881. He, at the time of the sale, was sole executor; she having been discharged by the orphans court, of Hudson county, on the 16th day of April, from further performance of the duties of her office as executrix, and as executrix, except accounting for and paying over the money or assets received by her by virtue of her office. She was, therefore, not executrix at the time of the sale. The section of the will by which she and Mr. Lewis were appointed executors, is as follows:

"I hereby nominate, constitute and appoint my beloved wife, Lydia Ann Clark, executrix, and my friends, William A. Lewis and ———, both of Jersey City aforesaid, executors of this my last will and testament, to which said executrix and executors, the survivors and survivor of them, I commit the proper administration of my estate, the execution of the powers and the discharge of the duties herein imposed."

The testator then gives to his wife his homestead and the plot of ground connected therewith, in fee, and his household furniture and household effects, paintings and library, horses and carriages, and his barn and stable and the improvements on the land connected with the homestead, also another house and lot in fee, and his interest in the unsettled estate of a certain business firm. He then gives a house and plot of land to a church, with a limitation over in a certain event, and proceeds as follows:

Minch, 3 Stock. 16; *Rickey v. Hillman*, 2 Hal. 180; *Britton v. Lewis*, 8 Rich. Eq. 271; *Johns v. Norris*, 7 C. E. Gr. 102, 12 C. E. Gr. 485.

If the relation of trustee and *cestui que trust* has terminated, the former may buy lands previously included in the trust, *James v. James*, 55 Ala. 525; *Munn v. Burges*, 70 Ill. 604; *Bush v. Sherman*, 80 Ill. 160; *Wortman v. Skinner*, 1 Beas. 358; *Beckett v. Tyler*, 3 McArth. 319; *Ex parte Lacey*, 6 Ves. 625; *Ex parte Bennett*, 10 Ves. 393; see *Bellamy v. Bellamy*, 6 Fla. 62, 110, 126; *Eldridge v. Smith*, 34 Vt. 484; *Knight v. Majoribanks*, 2 Macn. & G. 10; *Roberts v. Moseley*, 64 Mo. 507.

A trustee cannot, by any act of his own, without communicating with his *cestui que trust*, divest himself of the character of trustee till he has performed his trust, *Chalmer v. Bradley*, 1 J. & W. 51, 68; *Johnson v. Johnson*, 5 Ala. 90, 98; *Merrill v. Farmers Loan and Trust Co.*, 24 Hun 297.

In *Mackintosh v. Barber*, 1 Bing. 50, a testator devised lands to be sold by his six executors, whom he named, and the proceeds to be held by them on certain trusts. A purchase of part of the lands by one executor, who never proved the will, but renounced, was deemed valid.

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"All the rest and residue of my houses and lands and real estate remaining and not hereinbefore particularly devised, whatsoever and wheresoever situate and being, I hereby authorize, empower and direct my said executrix and executors, the survivors and survivor of them, within one year after my decease, or within such further time as they may deem advantageous and to the best interest of my estate, to bargain and sell, either at public or private sale, as they may deem best, to any person or persons and for such price and prices and on such terms as they may think proper, hereby authorizing them to receive in part payment at such sale or sales part-consideration mortgages on such liberal terms as they may deem prudent and advantageous to my estate, and for all the said houses and lands and real estate so to be sold, when sold as aforesaid, I hereby empower my said executrix and executors, the survivors and survivor of them, to make, execute and give to the purchasers thereof respectively, good and sufficient deeds in the law for the transfer thereof."

He then instructs his executrix and executors, and the survivors and survivor of them, to pay over in quarterly installments one-sixth of the rents arising from any houses and lands and real estate which he had directed to be sold from the time of his death to the time of such sale and conveyance, after paying thereout all taxes, assessments, repairs and interest on mortgage encumbrances, if any, to each of five persons whom he names, his wife and his two daughters, and their husbands, and the other sixth to his wife for the education of his grandchildren. He then, after a recom-

In *Stacey v. Elph*, 1 Myl. & K. 195, a person named as executor and trustee under a will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate, but purchased a part of it and took a deed therefor from the widow, who was tenant for life, and from the heir, to whom the estate must have descended upon a disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the testator's property as her friend or agent.—*Held*, that the sale to him was valid.

In *Spring v. Pride*, 10 Jur. (N. S.) 646, a husband, who was trustee for his wife, resigned in order that he might buy part of the trust property, and a successor was appointed, who shortly thereafter sold it to him.—*Held*, that the sale was void.

In *Ex parte James*, 8 Ves. 337, a purchase by the solicitor of a bankrupt commission was set aside, and the lord chancellor would not permit him to bid at the resale, although he offered to give up the position of solicitor. See, also, *Weeks on Attys.* § 273; *Rorer on Jud. Sales*, chap. VII.; *Newcomb v. Brooks*, 16 W. Va. 32; *White v. Iselin*, 26 Minn. 487; *Morgan v. Wattles*, 69 Ind. 260; *Jenkins v. Pierce*, 98 Ill. 646.—REF.

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mendation as to the collection of the rents, instructs and directs his executrix and executors, the survivors and survivor of them, to pay all his debts, including bonds and mortgages, as soon as convenient and practicable, out of any money or mortgages in the hands of his executrix and executors not thereinbefore particularly bequeathed, and also out of and with the proceeds of sale of houses and lands thereinbefore provided for, and to assign mortgages in payment of his debts when convenient and advantageous to do so. Then follow imperfect pecuniary bequests to his wife and others of thousand dollars each ; one to another person of dollars, and some complete bequests of notes and a balance due him on a settlement. He then proceeds as follows :

"I nominate, constitute and appoint my said wife, Lydia Ann Clark, and my said friends _____ and _____ the survivors and survivor of them, trustees and trustee under this my will, for the purposes and discharge of the duties and trusts hereinafter created and imposed."

And after providing that the trustees shall not be required to give security, and expressing his entire confidence in them, he directs them to invest and keep invested in the securities he designates, the sums of money he thereafter mentions, until such time as they shall be wholly distributed as thereafter provided. He then directs that there be set aside out of his estate not thereinbefore bequeathed, to be by his trustees so invested, the sum of
thousand dollars for each of his two daughters and their respective children. He finally gives all the rest and residue of his estate not thereinbefore devised, bequeathed, or set apart, to be invested as thereinbefore directed and then remaining undisposed of, under any previous provision of his will, to his wife and two daughters in equal shares.

The question to be decided is whether the complainant's deed will pass a valid marketable title to the land mentioned in the agreement, whether the deed from the executor to her gives her a good legal title, and that title is not subject to any trust under the will. The will gives to the executors an absolute power of sale, not a power for any particular purpose, but a general power.

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The testator evidently intended that all his real estate should be converted. His direction on the subject is positive and absolute. This is not disputed; it is admitted by the answer. The question here is not as it was in *Brearley v. Brearley*, 1 Stock. 21, cited by defendant's counsel, whether the power is not limited to conversion for certain purposes only; for here it is undeniable that the testator intended an absolute conversion of the estate for, among other purposes, the payment of his debts generally. By the will the executors are directed to pay the testator's debts and indebtedness of every description, including bonds and mortgages he may owe on his estate, out of any money or mortgages in their hands not thereinbefore particularly bequeathed, and also out of the proceeds of the sale of the real estate. That the executor, therefore, had power to sell, and that it was his duty to do so, is clear. It is urged, however, that the power is to the executrix and executors (while only one executor is appointed), and the survivors and survivor of them, and it is agreed that the testator meant to give the power in the first instance to three and not to two only, and the survivors and survivor, and that if it should be held that he gave the power to those whom he named, and his wife resigned her executorship, the power could not be executed by Mr. Lewis, for he is not the survivor. The testator named but two persons as executors, his wife and Mr. Lewis, and he appointed but those two. The fact that it would seem that before he executed the will he contemplated naming another executor, is of no importance; he, in fact, appointed only two. The complainant, as before stated, was duly discharged from her office of executor before the sale. By the act of 1879, it is provided that where an executor resigns his executorship, the trust to sell or power of sale shall vest in the remaining executor or executors, unless otherwise provided in the will. *P. B. of 1879* p. 56. This act is applicable to the case in hand. It was passed before the sale. An executor who, on his own application, obtains his discharge from a court of competent jurisdiction, must be regarded as thus resigning his office. But by the act of March 17th, 1881 (also passed before the sale), the provision is in terms extended to cases where the executor is discharged from

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office by a court of competent jurisdiction. *P. L. of 1881 p. 125.* The complainant obviously had a right to resign her office in view of her personal interest in the sale which was about to take place, and having been discharged from her office, had a right to purchase at the sale. The sale was an actual one, and a fair one. There is no evidence of any fraud or evil practice about it. That the persons interested in it agreed among themselves as to the prices which they would bid, so as to prevent sacrifice, manifestly constitutes no objection to it; and, it may be remarked, the executor was not a party to the agreement. The sale was open and public, and actually to the highest bidder. But it is urged that the complainant, though discharged from her office of executrix, still held, as she yet does, that of trustee, and that the trusteeship was in reference to the funds, or some part thereof, derived from the sale of the real estate; and it is agreed that her buying at the sale was inconsistent with her duty as such trustee. It is enough on this head to say that the sale was in no sense hers.

No express trust is created by the will in the executors, as such, as to any part of the estate, except the rents before sale. For the trusts for his daughters, the testator makes a separate appointment of trustees, whom he charges with the trusts accordingly. It is urged by defendants' counsel that the fact that certain bequests are, as before stated, incomplete, may affect the power of sale, and that they show that the testator's design, so far as they are concerned, was not carried out. But in the first place, the power of sale, as has already been said, is not dependent on those bequests in any way. It precedes them in the will and contains no reference to them, and it is evident that the intention of the testator in giving it was to cause an absolute conversion of his estate. In the next place, the bequests contained the blanks when he executed the will, and he therefore is presumed to have intended that they should be incomplete. Nor can the proposition of defendants' counsel, that the testator died intestate of the property in question, be maintained. He died intestate of no part of his estate. The residuary gift is of all his estate not thereinbefore specifically devised, bequeathed or set apart to

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be invested as thereinbefore mentioned, and remaining undisposed of under any previous provision of the will. If the trusts in favor of his daughters are void (for imperfectness), then nothing is set apart by those bequests, and all that is not specifically given passes by the residuary clause. The view I take of the subject renders that question of no importance in this case; for if the executor had the power of sale the title of the complainant is good. And here it may be added that the two daughters are before this court testifying in this cause on behalf of the complainant that they are satisfied with the sale of the property to the complainant, and disclaiming all claims on or to it, and all interest therein. There should be a decree requiring the defendants specifically to perform their contract, and it should be with costs.

CHARLES C. HAVENS et al.

v.

SAMUEL S. OSBORN et al.

Where alterations and interlineations in a deed, prejudicial to the grantor, are claimed to have been fraudulently made, and the grantee admits that he made them after the deed was executed, but alleges that he did so with the knowledge and consent of the grantor, the burden of proof rests on the grantee.

Bill for relief. On final hearing on pleadings and proofs.*Mr. Charles Haight*, for complainants.*Mr. William H. Vredenburg*, for defendants.

THE CHANCELLOR.

This suit is brought by the heirs-at-law of Cortenius S. Havens, deceased, late of the county of Monmouth, against the

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heirs-at-law of Abraham S. Osborn, deceased, late of that county, for relief against an alleged fraudulent alteration of a deed of conveyance, made by Havens and wife to Osborn, dated June 18th, 1845, by which, for the consideration of \$10, as expressed in the deed, the grantors conveyed certain lands in Monmouth county.

The complainants allege that the deed, as originally drawn, conveyed only certain cedar swamp, and that since its delivery, it has been altered without the knowledge or consent of the grantors, so as to purport to convey also certain lands belonging to Havens's wife (who was also the owner of the cedar swamp) on Manasquan Beach.

Havens died August 3d, 1864. His widow is also dead. She died in 1871. Osborn died November 21st, 1865, leaving a last will and testament, by which he devised lands, but made no mention of the beach property in question. He did not devise it specifically, nor does his will contain any residuary clause. After his death, and in 1876, his son, Samuel S. Osborn, obtained a conveyance from his other heirs-at-law of all their undivided shares and interests in the property in question. The Havens deed was not then on record, and was not recorded until March 15th, 1878. That deed was drawn by Samuel S. Osborn; its execution was witnessed by John S. Forman, now deceased, who also, as a judge of the court of common pleas of the county, took the acknowledgment. It was acknowledged on the 21st of June, three days after its date. An inspection of the deed shows many erasures and interlineations. Among the latter are the words, "rights of Manasquan Beach remaining unsold," in the description of the premises intended to be conveyed. That the deed was altered after execution, is admitted by Samuel S. Osborn, in the answer.

The bill prays an answer on oath; that the Havens deed may be declared to be void, and the title of the complainants freed from the cloud which the record thereof casts upon it, and that Samuel S. Osborn and his wife, and any person holding under them or any purchaser from them, may be enjoined from setting up title against the complainants by virtue of the deed, or from

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using the deed or the record thereof as evidence of the title, or in any way interfering with the title and possession of the complainants, and that the cedar swamp, originally conveyed by the deed, may be decreed to belong to and be the property of the complainants, because of the fraud in the alterations and interlineations in the deed.

The bill alleges that Havens was in possession, in right of his wife, of the beach lands and swamp from the time of his marriage, in 1822, to his death, and that since then, the complainants, as his heirs-at-law, have been in possession thereof. The answer, on the other hand, denies that Havens or the complainants, or any of them, have been in possession of those premises or any part thereof since the conveyance by Havens to Osborn, and alleges that Abraham S. Osborn took full possession of the land and held it continually from the time of the conveyance up to his death, and that since his death the property has been in the possession of the defendants or some or one of them.

It is quite clear, from the evidence, that the beach lands in question have been in the possession of neither the one party nor the other since the Havens deed was made. At and ever since that time, up to a comparatively recent period, the land was of very little or no value; was used for no purpose by anybody, and was not enclosed, so that in determining the question presented in this cause, no aid is to be derived from the fact of possession since the making of the deed. As before stated, the answer on the part of Samuel S. Osborn admits that the interlineations and erasures which appear in the deed, were made after execution, but it alleges that they were made before acknowledgment and delivery. Judge Forman died, probably before this suit was begun, and Samuel S. Osborn is also dead. He died without giving any testimony in the cause. In the answer he makes the following statement: that he wrote the deed at its date (June 18th, 1845), and that Havens and his wife, at that date, signed it in the presence of Judge Forman, who then subscribed his name as a witness to its execution; that Havens and his wife then went away, leaving the deed unacknowledged and uninterlined, in his, Samuel S. Osborn's, possession; that

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on the 19th or 20th of the same month, Havens came to the storehouse of Abraham S. Osborn, and instructed him, Samuel S. Osborn, to make the additions and alterations which appear in the deed; that the change and additions were made in pursuance of a bargain and agreement between his father and Havens; that he was present when his father and Havens completed the agreement of sale, and heard its terms and knows that the deed correctly contains that agreement and the whole of it; that that agreement, as finally consummated, was, that the consideration named in the deed should be paid by his father and accepted by Havens in full for the conveyance to the former, not only of all the rights of cedar swamp, as called and known by the name of Lawrence's Surveys, of or belonging to Havens and his wife, but also of all their rights to Manasquan Beach, called and known as Lawrence's Beach, and that "Lawrence's Surveys" and "Lawrence's Beach," which he says is now known as Manasquan Beach, really included and embraced the rights of Manasquan Beach in controversy in this suit, all of which beach rights were then of very little, if any, value. He further says, as answering more in detail, that the agreement between his father and Havens for the purchase of the land, was a verbal one; that it was made in his presence, and that he was personally acquainted with the whole matter; that the deed was drawn by him, and correctly contained the agreement of purchase, and did fully grant, bargain, sell and quit claim, for the consideration of \$5, as therein expressed, to his father all the rights of Havens and his wife in cedar swamp, as known by the designation of "Lawrence's Surveys," and that in fact the description, by its very terms, embraced and included the rights of Havens and his wife in Manasquan Beach, then yet remaining unsold; that the deed was first signed by Havens and his wife and witnessed by Judge Forman on the day of its date, but was not acknowledged or delivered on that day, nor until the 21st; that on the 19th or 20th, at the storehouse of his father, in the presence of his father and Havens, he suggested that it would be better to expressly designate the beach rights on Manasquan in the deed, and that thereupon Havens and his wife agreed, for the addi-

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tional consideration of \$5, which his father then agreed to give them, that such insertion should be made; that the consideration which the deed then expressed, \$5, was changed by him to \$10, and that then the insertions, erasures and interlineations, and each and all of them, were made in the deed in all respects as they now appear; that after they were made he wrote, in the presence of Havens and Judge Forman, over the signature of Forman, as the subscribing witness, the note that the interlineations and erasures in the deed were made before signature; that afterwards Forman took the acknowledgment of Havens and his wife (but not in his presence), and wrote and signed the certificate of acknowledgment on the deed; that before the delivery of the deed, and at the same time, his father gave to Havens \$5 in cash, and a joint note of hand for \$55, signed by his father and him, for the consideration named in that deed, and the amount of the consideration of another deed of conveyance, dated June 12th, 1845, made by Havens and his wife to his father (both deeds having been acknowledged on the same date), which note is produced; that the note was written by Forman and signed by his father and him when the deed was delivered by Havens and his wife; that the money and note were thereupon paid and delivered by his father to Havens, and accepted in full payment and satisfaction for the consideration of the deeds, and that Havens and his wife then delivered the deeds to his father, who took them away and retained possession of them until his death. And he adds that the deed in question was not recorded because his father did not think that the property thereby conveyed was of sufficient value to justify the expense.

It will be seen that not only is the alteration of the deed admitted, but it is also admitted that the note stating that the alterations were made before the deed was signed, was written by Samuel S. Osborn, over the signature of the subscribing witness, after the deed was executed. As has already appeared, all the parties to the conveyance are dead. The scrivener who drew it and the officer who took the acknowledgment are also dead.

On the part of the complainants, two witnesses, John C. Havens and Lydia Ann Havens (themselves two of the complain-

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ants), testify not only that the agreement for sale between their father and Osborn had reference only to the swamp land, but that they saw and read the deed, and also heard it read by Judge Forman to their mother before it was signed. They both testify that the deed was acknowledged on the same day on which it was signed. The former, John C. Havens, testifies that the agreement between his father and Osborn was verbal; that it was to the effect that the latter was to pay the former \$10 for the cedar swamp, and his father agreed to take that sum for that land. That Samuel S. Osborn drew the deed, and Abraham S. Osborn handed it to the witness's father, who handed it to his daughter, Lydia Ann, and she took it into the house; that the deed remained in the house two or three days before it was acknowledged, and then Judge Forman came to the house and took the acknowledgment, and that it then remained in the house for three or four days longer, and until it was handed to Abraham S. Osborn by the witness's father; that it was never out of the house during that time; that it was executed and signed by his father at the same time it was acknowledged. That he (the witness) read a portion of it, and heard it read to his mother by Judge Forman; that the witness read the first page of the deed and saw that it ran about the cedar swamp and was in accordance with the agreement; that his father and mother and Judge Forman and his sister and himself were present when his father signed the deed; that it was read to his mother, and that the interlineations and erasures did not appear in it at that time. Lydia Ann Havens testifies that Abraham S. Osborn came to the house and brought the deed and left it to be acknowledged; that he gave it to her father and her father handed it to her; that some two or three days afterwards Judge Forman came and took the acknowledgment of the deed; that her father called to her to get the deed; that he was sitting at the table, and she got the deed and gave it to him; that she remained in the room while it was being executed; that it was opened and read to her mother, and that her father and mother both signed it; that Judge Forman asked her mother if she signed it without any threats or compulsion of her husband, and that he then finished writing; that

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her father, mother, Judge Forman and her brother John and she were present when Judge Forman read the deed to her mother before it was signed ; that she heard it read ; that she read it herself after it was executed, and that after it was executed it was left at her father's house for a day or two, until it was given to Abraham S. Osborn by her father, when he was passing by, and that she read it the same day after it was acknowledged, before she left the room, and had it in her hands. She swears that it is the same except where it is defaced by the erasures and interlineations ; that when she read it, it was a perfectly written document ; that the interlineations and erasures were not there when she read it and when it was acknowledged ; that it was in her possession from the time it was acknowledged until her father gave it to Abraham S. Osborn ; that she saw her father deliver it to the latter ; that she stood on the stoop and saw him hand it to him, and that at the time when the deed was delivered to Abraham S. Osborn there were no defacements or interlineations in the deed.

These two witnesses both swear that the deed did not, when it was acknowledged, contain the interlineations and other alterations now seen upon it. Of itself, this testimony is sufficient to overcome the answer of Samuel S. Osborn on the subject. That answer is further impeached, however, by the testimony of Robert Estell and Lydia Ann Havens, of conversations had by Samuel S. Osborn with them. Estell swears that in the summer of 1876 or 1877, he owned a piece of property on the beach, and applied to Osborn to survey it for him ; that in their conversation, Osborn said to him that he thought there was quite a speculation to be made in buying up those beach rights (referring to the beach rights in what the witness calls the "Lawrence Lots"), and that if he, Estell, would buy up a lot of them, he would locate them ; that he asked Osborn who had beach rights to sell, and he replied that Richard Borden's heirs had one-half of a seventh ; that he asked him who the heirs were, and he said Joseph Borden and his sisters, and that Cortenius Havens's heirs owned one-seventh ; Estell asked him where they lived, and he said that one of the boys lived in Brooklyn ; Estell asked him if he thought, if he

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should go to see him, he could purchase of him, and Osborn said that he thought he could; that his father had bought some property of Mr. Havens, and he could have bought this whole thing for \$5 but did not think it was worth anything, and therefore did not buy it. Estell says that Osborn told him that if he would purchase a property he would locate it for him if he would give him one-half. He swears that Osborn told him that the Havens heirs owned one-seventh, and that he went to see them by reason of that conversation; and that the only way he knew that they owned the property, was from Osborn's statements to him on the subject.

Lydia Ann Havens testifies that in January, 1878, Samuel S. Osborn came to her house and said to her, "You know you own beach property, now it will soon come in market and will be valuable;" that she replied, "How will I know this?" and he said, "I will write and let you know." She also says that at that time he had access to the old papers of the family; that he was almost a day taking copies of their old deeds, and that he had four or five sheets of paper written full. She adds that Osborn said to her, referring to their rights in beach property, "When they come in market, don't sell them to any one else; give me the first refusal, as they join me, and don't let Estell have them anyhow."

The statements of Samuel S. Osborn in the answer in reference to the alterations in question, are inconsistent and contradictory in a very material respect. In his first statement he says that after the deed was executed, it was left with him, and that the next day or the next day but one afterwards, Havens came to the storehouse of his father, and there instructed him to make the additions and alterations which appear in the deed. In the other statement he says that he himself suggested that it would be better to expressly designate the beach rights on Manasquan in the deed, and that thereupon Havens and his wife agreed, for the additional consideration of \$5, that the alterations should be made. In his first statement he substantially says that the alteration was made at the suggestion and by the direction of Havens; and in the other, that it was made on his own

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suggestion, and that Havens and his wife only consented to it in consideration of the payment of a sum of money to them.

Where, as in this case, a deed is attacked on the ground that interlineations and erasures have been fraudulently made to the prejudice of the grantor, and the grantee admits that the erasures, alterations and interlineations were made by himself after the deed was signed and witnessed, and that he himself wrote the note above the signature of the subscribing witness, certifying that the alterations and additions were made before signing, and alleges that the alterations and additions were made with the knowledge and consent of the grantor, and the note with the knowledge and consent of the subscribing witness, the burden of proof is upon him. On the part of the defendants it is urged, however, as before stated, that the deed, as originally drawn, conveyed the property in question. The subject of conveyance originally stated in the deed, was—

“All our and each of our rights, titles, interests, estate, claims and demands, both at law and in equity, and as well in possession as in expectancy, of, in and to all our rights of cedar swamp, as called and known by Lawrence Surveys, as the one-half of two-thirds of one-seventh of fourteen-fifteenths, that was conveyed to David Curtis by Herbert Curtis” &c. (stating derivation of title); “also, one-third of one-seventh of fourteen-fifteenths, as conveyed” &c. (stating derivation of title), “together with all other of our rights of Lawrence’s Surveys of cedar swamp to which the said Kortenius S. Havens and his wife have right by their father, John Curtis, and by virtue of his last will and testament, and to which he, the said John Curtis, by virtue of his father, David Curtis’s, last will and testament, had good right, together with all and singular the hereditaments and appurtenances thereunto belonging.”

The deed has been altered so that the words, “together with all other of our rights of Lawrence’s Surveys of cedar swamps” &c., now read “together with all other of our rights of Lawrence’s Beach and cedar swamps” &c. The defendants insist that the words “Lawrence’s Beach and cedar swamps” are descriptive of land which embraced the tract in question, but it is evident from an inspection of the deed, that, as before stated, the words “Beach and” have been written over an erasure of the words “surveys of,” and the letter “s” has been added to the word “swamp” in the same sentence. This clause in the deed not

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only does not support the claim made by the defendants, but rather that made by the complainants; for the alteration just mentioned is one of those which are in question, and as the clause originally stood it confined the conveyance to land which was in Lawrence's Surveys of cedar swamp, and so was evidence of the intention of the parties to convey cedar swamp alone. But there is also cogent evidence of fraudulent alteration in the appearance of the writing of the deed. Samuel S. Osborn says in his answer, that the alterations were made either the next day after the deed was drawn, or the second day after, and the deed was drawn and executed nearly forty years ago. It is evident, from an inspection of the alterations in question, that they were made at a comparatively recent day, and were not made at or about the time the deed was executed. The note of the alterations made over the signature of the subscribing witness is a general one, and is as follows:

"N. B.—The interlining and erasures in this deed done before signing."

There were evidently some erasures in the deed at the time it was drawn, but they were words written by mere inadvertence, and undoubtedly erased as soon as written. The note for \$55, given by Abraham S. Osborn and Samuel S. Osborn to Havens for and on account of the consideration of the deeds, has no weight as evidence.

I am constrained to adjudge that the alterations in the deed, so far as concerns the rights of Havens and his wife in Manasquan Beach, are fraudulent. There will be a decree accordingly, and that no estate, right, title or interest of Havens and his wife, or either of them, in the Manasquan Beach property was conveyed or passed by that deed, and that the defendants and all persons claiming under Samuel S. Osborn be perpetually enjoined from setting up or claiming any title to the property, under or by virtue of that deed, and the defendants will be required to pay costs.

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JAMES T. MINCHIN

v.

THE SECOND NATIONAL BANK OF PATERSON et al.

On September 13th, 1881, the complainant, on behalf of himself and other creditors, filed a bill against the New York Silk Manuf. Co., a foreign corporation doing business in this state, alleging that it was insolvent and praying for the appointment of a receiver of its assets in this state, and for an injunction restraining it from receiving any of the debts due to it, and from paying or transferring any of its debts, money or effects. On October 21st, 1881, the injunction was issued, and early in November, 1881, a receiver was appointed. On October 3d, 1881, the defendant issued an attachment out of the Hudson county circuit court, under which all the silk company's property in this state was attached and other creditors came in. On October 29th, 1881, the defendant issued another attachment out of the same court, under which the same property was seized, and other creditors came in. Both attachments were afterwards removed into the United States circuit court for New Jersey, and the president of the corporation entered an appearance in the attachments in December, 1881. On demurrer to a supplemental bill filed by the complainant against the defendant and the other creditors admitted under the attachment and the auditor—*Held*,

(1) That the complainant had no standing as a party; that the suit, if maintainable, ought to have been brought in the name of the receiver.

(2) That the power of the court, in insolvency, over foreign corporations is mainly over their property or assets in this state; that the lien of the defendants and other creditors under the attachments was, under the circumstances, entitled to preference as against the receiver, and that the United States court had jurisdiction, and this court therefore could not interfere.

Bill for relief. On demurrer.*Mr. P. Stevenson*, for demurrants.*Mr. J. W. Taylor*, for complainant.

THE CHANCELLOR.

The bill is filed by a person who is a creditor and stockholder of the New York Silk Manufacturing Company, a corporation under the laws of the state of New York. It states that on or

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about September 13th, 1881, a bill was filed in this court by the complainant for himself and the other creditors against the company, and the defendants Grier and Harris, alleging that the corporation was insolvent and had suspended its business for want of funds to carry it on, and praying an injunction and the appointment of a receiver ; that although process has been issued (the bill does not state when it was issued) and served, none of the defendants have appeared in the suit ; that on the 21st of October in that year, about five weeks after the filing of the bill, an injunction was issued, and early in November following, a receiver was appointed under the act concerning corporations, and that the receiver, immediately after his appointment, gave bond and entered on the performance of his duties. The bill further states that on the 3d of October, 1881, about three weeks after the bill was filed, and about the same time before the injunction was granted, the Second National Bank of Paterson, a creditor of the insolvent company, sued out of the circuit court of Hudson county, in this state, an attachment against the company, under which all its property and assets in that county, which were all it had in this state, were levied upon and seized, and that certain other creditors were admitted under the attachment ; that on the 29th of the same month of October, the bank sued out another attachment against the company in the same court, and under it attached the same property, and that other creditors were admitted under that attachment also ; that on the 6th of December, after the injunction and the appointment of the receiver, Grier unwarrantably assuming to act for the company, caused its appearance to be entered in the attachments, and so created a preference in favor of the bank and the other creditors who had appeared in those suits ; that the bank and those creditors, at the time of their proceedings in the attachment, knew of the proceedings in insolvency in this court, and knew, also, the fact that the company was insolvent ; that the attachment suits were removed to the circuit court of the United States for the district of New Jersey, and that application on behalf of the receiver has been repeatedly made in both of the above-mentioned courts to vacate and set aside the appearances, and quash

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and dismiss the attachments, but the bank refused to consent to the granting of those applications, and the courts declined to grant them without such consent, because, among other reasons, the receiver had no standing in the suits and could not be heard in them, and the courts had no power to grant the relief in the proceedings. The bill further states that the auditor in the attachments refuses to deliver up the goods to the receiver, and threatens to sell them in order to apply the proceeds to the payment of the debts of the bank and the other creditors under the attachments. It also alleges that the property can be sold to a much better advantage through the receiver than through the auditor. It is exhibited against the company and Grier and Harris, the bank and the other creditors who were admitted under the attachments, and the auditor, and it prays that the complainant may have the same relief against the defendants that he might have had if the facts thereinbefore stated by way of supplement, had been stated in the original bill; that the bank may be enjoined from further prosecuting the attachment suits, or procuring or insisting on a sale of the attached property, and that the auditor may be restrained from selling, and may deliver up the property to the receiver, and that if the property be sold under the attachments, and the bank and the other creditors admitted under the attachments shall, under those proceedings, receive more than the share they would have got had the estate been settled and administered under the insolvency proceedings here, they may account for and pay to the receiver the excess, and that in case of sale they and the auditor may account for and pay the receiver the difference between the price for which the property shall be sold and its appraised or real value. The defendants have demurred for want of equity.

The first question to be considered is whether the complainant has any standing to maintain this bill. The original bill was, as has been stated, a bill for the appointment of a receiver under the act concerning corporations, to collect, receive and administer the property and assets of the corporation. Under it a receiver was appointed, who was duly qualified. He thereupon became vested as far as practicable, seeing that the corporation

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is a foreign one, with the powers conferred by the statute on receivers of insolvent corporations, and as such receiver he represented from thenceforth the creditors and stockholders of the company. If this suit can be maintained at all, it is he who should bring it. He has not refused to act in vindicating the rights of creditors and stockholders in the matters which are the subject of this litigation, and he is not even a party to the bill. That he has, and had when this bill was filed, the power to bring a suit for the purposes which this suit is designed to answer, is clear. The act, by the 72d section, vested in him "full power and authority to demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to the company." By the 77th he had "full power and authority, whenever he should deem it proper, to institute suits at law or in equity in his own name as receiver, for the recovery of any estate, real or personal, debts, rights in action, damages and demands, whatsoever and where-soever existing in favor of the company at the time of the insolvency or suspension of business, or accruing subsequently thereto." *Rev. pp. 189, 191.* In *Smith v. Trenton Del. Falls Co.*, 3 Gr. Ch. 505, it was held that after the appointment of receivers of an incorporated company, a bill could not be maintained by a creditor of the company to settle the validity and priority of claims and encumbrances on the property of the company. In *Chester v. Halliard*, 7 Stew. Eq. 341, the question now under consideration was not raised. In *Rankine, Receiver, v. Elliott*, 16 N. Y. 377, it was held that the right of action against the stockholders of an insolvent corporation to recover the unpaid amount of their subscription, vested in the receiver, and a judgment creditor who had brought an action against a stockholder, which was begun after the order for sequestration, but before the appointment of the receiver, was restrained from prosecuting his suit. In *Atty. Gen. v. Guardian M. L. Ins. Co.*, 77 N. Y. 272, a suit brought for the recovery of the assets of the company before a receiver was appointed, was, at the in-

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stance of the receiver, who had brought a suit for the same object, enjoined on the ground that the receiver was the proper party to bring the suit. In the recent case of *Brinckerhoff v. Bostwick*, 88 N. Y. 52, in a suit by stockholders of a national bank against directors, to recover compensation for losses and misapplication of the funds through the negligence and misconduct of the directors, it was held that in such case the corporation is the proper party to bring suit, unless it refuses to sue, or the parties whom it is sought to charge and who, therefore, must be made parties to the suit, have control of it, or unless its property be in the hands of a receiver, in which last case it must be brought by him unless he refuses or is the person or one of those against whom the suit is brought. The suit in such cases, therefore, is to be brought in the name of the corporation or the receiver, unless sufficient cause appear to the contrary. Here no cause appears or is alleged why the receiver should not bring the suit. He is the representative of the corporation, of the creditors and stockholders, and has title to all the property and rights of the corporation. The complainant is merely one of the creditors and stockholders. In the absence of a refusal on the part of the receiver, or of the fact that the receiver stands in such a relation of personal involvement in liability in respect to the matters as to which relief is sought, or other valid reason, the complainant cannot maintain the suit. The demurrer, therefore, must be allowed on this ground.

But further, apart from this objection, the suit cannot be maintained on the merits of the case as presented by the bill, if it had been brought by the receiver. The act concerning corporations makes the remedies thereby provided in case of insolvency applicable to foreign corporations, so far as practicable. Its language is, that foreign corporations doing business in this state shall be subject to all the provisions of the act, so far as they can be applied to such corporations. *Rev. p. 196 § 103.*

Obviously, there are provisions of the act which cannot be applied to such corporations; for example, this court cannot hinder such corporations from exercising their franchises, except as it may enjoin them from exercising them in this state. It can

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sequester their property here and administer it for the benefit of creditors and stockholders, but it can do but little more. A foreign corporation coming into this state and doing business here, is indeed liable here on its contracts made here, but the question under consideration is not a question of liability to suit. It is a question of power over the property of the foreign corporation to administer it for the benefit of creditors and stockholders. As to the power of this court over the corporate existence or the exercise of its franchises, that has already been adverted to. The only question for consideration is, as to the character and extent of the power over the corporate property, for the purpose of administering it for the benefit of creditors or stockholders residing here. In the language of the New York supreme court, in *De Bemer v. Drew*, 57 Barb. 438, this court cannot regulate the internal affairs of foreign corporations, nor enforce any remedy beyond the limits of this state; it cannot annul or forfeit their charters, but it can and ought to provide for the collection of debts against them, when they or their property are brought within the jurisdiction of the courts of this state. The foreign corporation doing business here is subject to the provisions of our statute, so far as its property in this state is concerned. The proceeding is, practically, merely a proceeding *in rem*, and as such must be subject to prior liens, created by prior proceedings in attachment, and the vigilant creditor who obtains such prior lien at law ought not to be, and cannot be, deprived of his advantage. *Hubbard v. Hamilton Bank*, 7 Metc. 340.

The efficacy of the above-quoted provision of our statute as to foreign corporations, is in securing to creditors and stockholders, citizens of this state, a just application of the property in this state of those corporations when insolvent. In the case in hand, the bill was filed on the 13th of September, but no injunction was issued upon it until the 21st of October, five weeks afterwards, and then the corporation was not restrained from removing its property from this state to its place of location or elsewhere, but only from receiving any of the debts due to it, and from paying or transferring any of its debts, moneys or effects. In the meantime, on the 3d of October, the bank sued

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out an attachment in the Hudson county circuit court, and under it attached all the property of the company in this state. Under that attachment other creditors were admitted.

After the injunction had been issued, but before the receiver was appointed, the bank issued another attachment out of the same court, under which the same property was attached, and other creditors were admitted. The mere filing of a bill in such case, does not divest the company of its property. The appointment of a receiver under the statute, operates as a transfer. Said Chancellor Halsted, in *Corrigan v. Trenton Del. Falls Co.*, 3 Hal. Ch. 489, 496, "The statute, and the appointment of receivers under it, are a conveyance or transfer of all the property of the insolvent company to the receivers for the benefit of the creditors of the company, to be distributed in the mode pointed out by the statute." See, also, to the same effect, *Freeholders of Middlesex v. State Bank at New Brunswick*, 2 Stew. Eq. 268, 274. In the matter of *Waterbury*, 8 Paige 380, it was held that where a creditor of a corporation, by legal diligence, and without any voluntary assistance from the corporation or its officers, obtained a legal lien on its real or personal estate by judgment, or the levying of an execution, before the order of the court was obtained for the appointment of a receiver and the dissolution of the corporation, he could not be deprived of the preference he had thus acquired. In the case in hand, the filing of the bill of course did not prevent the corporation from removing its property out of the jurisdiction, and so beyond the reach of its creditors here. And how were such creditors to know that the bill had been filed? Are the creditors in such cases required to wait before taking steps to secure a lien on the property, until they can ascertain by search of the files of this court, whether a bill has been filed in insolvency against the corporation? Or, are they at liberty to proceed at law with what dispatch they may, to secure a lien on the property? Surely the latter. And having obtained the lien, they are entitled to the benefit of their diligence. In this case, it may be remarked, the proceeding at law was by attachment, which, in its nature, is for the benefit of all applying creditors. Moreover, when the

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bill was filed, the case made by it was not sufficient to warrant even an injunction, and so the case stood for five weeks, so far as appears, without action, and a receiver was not appointed until nearly two months after the filing of the bill.

But it is urged that the bill alleges that the president of the company, in fraud of the statute, and with a view to giving to the bank and to the creditors who had been admitted under the attachments a preference, entered the appearance of the company to those suits. The appearance was entered in December, about a month after the appointment of the receiver. The injunction prohibited the company and its president and directors from paying and transferring any of its debts, moneys or effects, but it did not prevent them from appearing to an attachment, and if the effect of the appearance was (as it was in fact) to give to the bank and the other creditors who had been admitted under the attachments a preference, it was the result of a lawful act, and one which was (especially under the circumstances) entirely legitimate. The bill does not allege that the debts thus preferred or the issuing of the attachments were not *bona fide*.

The bill seeks relief against the auditor in attachment, who is an officer appointed by the federal court. It prays that he may be restrained from selling under the authority of that court. That court has jurisdiction under the attachments, and the jurisdiction under the attachments is prior to that which this court obtained over the property by the proceedings on the original bill in this suit. As between the federal and state courts, the rule is, that that court which first obtains jurisdiction shall retain it to the end. *Riggs v. Johnson Co.*, 6 Wall. 166; *New Jersey Zinc Co v. Franklin Iron Co.*, 2 Stew. Eq. 422. If the attachments were valid liens as against the receiver, as I think they were, this suit cannot be maintained, and if they were not, the complainant cannot maintain it. The demurrer will be allowed.

Duryee v. Martin.

HENRY B. DURYEE

v.

ALFRED W. MARTIN et al.

A testator gave to his executor power to sell his lands, with the assent of a majority of the devisees, who were his wife, his brother and his three sisters, in case of their inability to make a partition. The executor, his brother (one of the devisees), gave to his sisters a mortgage for \$8,000 on his interest in the premises, or in the proceeds, if the land should be sold, for moneys loaned by them to him, and also to indemnify them as sureties on his bond as executor. A mortgage on the premises was also given by him and his sisters to the widow to secure to her \$1,000 due her from the testator, and also to secure to her an annuity in lieu of her claims under the will. Upon the devisees' request, they being unable to make partition, the property was sold by the executor.—*Held*,

(1) That the claim of the sisters under their mortgage, to be paid from the executor's share of the proceeds of the sale, was superior to that of his individual creditors, who had obtained judgments against him before the sisters' mortgage was given.

(2) That the devisees giving the widow a mortgage for the debt due her from the testator, did not deprive them of the power to consent to a sale of the premises under the will.

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Creditor's bill. On final hearing on pleadings and proofs

Mr. F. A. Dennis and *Mr. W. D. Holt*, for complainant.

Mr. W. Y. Johnson for another creditor, *Mrs. Catharine M. Johnson*.

Mr. J. F. Hageman, for the Martins.

THE CHANCELLOR.

Augustus L. Martin, late of Princeton, deceased, by his will gave to his wife, after payment of his debts and funeral expenses, all his household furniture, and also half of the rest of his personal property, and gave the other half to his brother, Alfred

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W., and his three sisters, Susan L., Rebecca A., and Eliza, in equal shares. He then gave to his wife, for life, the use, profit and income of one-third of his real estate, and gave the other two-thirds, with the remainder in fee of that third, to his brother and sisters in equal shares. The gifts to his wife were to be in lieu of her right of dower. He also provided that if his devisees could effect a partition of the real estate devised to them, satisfactory to themselves, the property need not be sold, but if not, and a majority of the devisees should assent to it, the executor (his brother) should sell the real estate, and pay over the proceeds of the sale to the several devisees, retaining one-third to be invested for his wife's life; the interest to be paid to her, and at her death the principal to go to his brother and sisters. The will was proved by the executor in April, 1881. In October, 1872, the complainant recovered a judgment against Alfred in the Mercer circuit court for \$342.36. By virtue of an execution which was issued thereon February 1st, 1882, he caused a levy to be made on Alfred's interest in the testator's real estate, which was property in Princeton. Mrs. Catharine M. Johnson recovered a judgment against Alfred in the supreme court of this state, September 27th, 1881, for \$629.02, and under execution thereon a levy was made on his interest in the property on October 5th, following. The property was sold by the executor May 8th, 1882, under the power of sale in the will, and was purchased by Susan L. and Rebecca A. Martin for \$10,250. The bill sets forth the foregoing facts, except the recovery of the judgment of Mrs. Johnson, and the issuing of execution thereon and making a levy thereunder, and alleging that the complainant has no lien on the property, seeks to obtain satisfaction for his judgment out of Alfred's share of the proceeds of the sale. Mrs. Johnson was admitted as a defendant, in virtue of her judgment, after this suit was begun. By the answer of Susan L. and Rebecca A. Martin, it appears that Alfred, before the sale, and on the 1st of January, 1881, gave to them a mortgage for \$8,000 to secure to them the payment of \$4,000 and interest, and to indemnify them against loss by reason of their having become his sureties in a bond given by him for the

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faithful performance of his duties as executor; and that he and Susan and Rebecca, in September, 1881, gave to the testator's widow a mortgage on the property for \$1,000 and interest, to secure the payment of a debt due to her from the testator, and another mortgage on the property to secure to her the payment of an annuity of \$350 for life in lieu of her dower, which she, for that consideration, released by deed. The mortgage to secure the annuity contains an agreement that if the security thereby given upon the mortgaged premises should be affected by a sale of the property, a new security should be substituted before the sale, as might be agreed upon by the parties interested, or as might be approved by the chancellor of this state. The mortgage to Susan and Rebecca declares that it is subject to a legal right of sale under the will of the testator, and that in the event of such sale the debt which it was intended to secure thereby, should and might be paid from the share of the proceeds of such sale that would be due to the mortgagor.

Under the provisions of the will, the title of the devisees, Alfred, Susan, Rebecca and Eliza, in two undivided thirds of the real estate, and in the remainder of the other third, after the widow's life estate, was a fee defeasible by the execution of the power of sale given to the executor in order to make partition.

The devisees could not agree upon a partition among themselves. One of them, Eliza, is, and for very many years has been, of unsound mind. Alfred, Susan and Rebecca united in a written request to the executor for a sale of the property, certifying that a partition of the devised premises could not be made satisfactorily to the devisees. The complainant, as the bill states, obtained no legal lien by virtue of his judgment, or his levy on Alfred's interest in the land under it. His lien was subject to the power of sale, and was wholly defeated and extinguished by the execution of the power. *Wetmore v. Midmer*, 6 C. E. Gr. 242; *Leggett v. Doremus*, 10 C. E. Gr. 122. And the same is true as to Mrs. Johnson. Nor have they or either of them any equitable lien. The mortgage to Susan and Rebecca, and the provision therein contained that the mortgage debt shall, in case of sale of the property under the power,

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be paid out of the proceeds of the sale, constituted an assignment to the extent of the debt and interest of the share of Alfred in the proceeds of the sale. *Herbert v. Tuthill*, Sax. 141; *Gest v. Flock*, 1 Gr. Ch. 108. And Alfred's share of the proceeds of the sale is not sufficient to pay the mortgage. The complainant and Mrs Johnson, however, insist that the mortgage from Alfred to Susan and Rebecca was fraudulent as against them; that it was without consideration; that the property was sacrificed at the sale, and that the giving of the mortgage and the sale of the property, were parts of a fraudulent design to defeat the judgment creditors of Alfred. It is fully shown that the mortgage was given for a full consideration, and that there were due to the mortgagees from the mortgagor, when the mortgage was given, about \$6,100, for money lent by them to him, and lawful interest thereon. It appears that he had borrowed from each of them the money, \$1,500, due her from their father's estate, and had borrowed from Susan other money also. Rebecca put in her claim under an assignment which he made for the benefit of his creditors in 1872, and Susan put in a part of her claim, and she received a dividend of ten per cent. thereon, for which credit was given in making up the amount due them from him when the mortgage was given. It is urged against the validity of Susan's claim, that no claim in her favor appears in the list of creditors annexed to the assignment. But notwithstanding that fact, it is proved that a claim to the amount of \$381.05, all that was then due her except the \$1,500 from her father's estate borrowed from her by Alfred, was put in and allowed, and she received a dividend on it. The rest of her claim at that time was the \$1,500 and interest, for which Alfred had given her a mortgage on a farm. For aught that appears, the property on which the mortgage had been given, had not then been sold under foreclosure. It was sold under such proceeding (though it does not appear when), and nothing realized by her therefrom. The rest of her claim for debt against Alfred when the \$3,000 mortgage was given, was for money borrowed by him from her after the assignment, and interest thereon. He, from time to time after the assignment, promised

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his sisters to pay them the money he owed them. They are both of small means, and are single; and one of them, Rebecca, is a confirmed invalid, and has been for many years, and is confined to the house. His subsequent promise to pay the balance of the debts put in under the assignment, and the debt which, though it existed at the time of the assignment, was not proved under it, constituted a valid legal obligation. The property was sold at a fair sale to the highest bidder, and appears to have brought a fair price.

The fact that a mortgage was given to the widow for \$1,000, a debt due her from her husband's estate, was adverted to on the hearing as being evidence of a waiver of the benefit of the provision for partition through sale. That mortgage is merely a mortgage of the land, with no provision in reference to a sale under the will. When it was given, the personal estate was exhausted in the payment of debts, and it was given to save the necessity of selling the real estate to pay the debt which it was made to secure, and which was a lien on it by law. The giving of this mortgage did not deprive the mortgagors of the power to consent to a sale by the executor under the power given by the will.

The bill will be dismissed, with costs.

In the matter of the petition of the collector of Upper Freehold township, in Monmouth county, for the payment of taxes assessed to JOHN S. COX.

The legislature directed that the taxes on all entailed property, or property held in trust or for life, should be paid out of the income, or by the person or persons having the present beneficial interest therein. *P. L. of 1879 p. 54.* Under that act, assessment of the tax on a mortgage taken in the name of the state for the investment of money in chancery was, in 1880, made on the person to whom the interest of the fund was payable. The legislature, by an act passed in 1882 (*P. L. of 1882 p. 120*), provided that taxes assessed on such

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persons for such funds since the act of 1879, should be paid by the person who claimed deduction of the mortgage from his taxable property, and allowed out of the interest.—*Held*, that the assessment was validated by the act of 1882.

Mr. C. Robbins, for petitioner.

Mr. James Buchanan, for John S. Cox.

THE CHANCELLOR.

This is an application by the collector of taxes of Upper Freehold township, in Monmouth county, to this court, under the 7th section of the supplement of March 17th, 1882 (*P. L. of 1882 p. 118*) to the act concerning taxes, to make order for the payment of certain taxes assessed in 1880 and 1881 in that township, against John S. Cox, upon the principal (\$5,046) of a mortgage given to the state. The mortgage was given under the 27th section of the partition act. *Rev. p. 802*. John S. Cox was the owner of a life estate in the property whereof partition was sought, and on sale of the property, a mortgage was taken in the name of the state to secure the payment of the bond of the purchaser. The bond and mortgage were taken in 1862. The condition of the former is to pay to John S. Cox, or his assigns, the interest at the rate of six per cent. per annum on the sum of \$5,046, half-yearly, during his natural life, and at or immediately after his death to pay the principal sum and all subsequently-accrued interest thereon to such person or persons as may be entitled to have and receive them under the last will of John W. Cox, deceased. John S. Cox insists that the assessments in question are illegal. They were made under the act of 1879, respecting taxes (*P. L. of 1879 p. 54*), which provides that the taxes assessed on all entailed property or property held in trust or for life shall be paid out of the income from such property, or by the person or persons having the present beneficial interest therein; but Cox insists that that act does not extend to the fund in question, and is not applicable thereto. Before the passage of that act, the money secured by the mortgage, which is to the state, was not taxable. *Trustees*

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&c. v. Trenton, 3 Stew. Eq. 667. It is insisted, however, on the part of the petitioner, that the supplement of 1882 (*P. L. of 1882 p. 120*) to the act concerning taxes, validated the assessments. By the 1st section of that act it is provided that it shall be lawful for the assessor or commissioners of appeal in cases of taxation, to deduct from the valuation of the taxable property for which any person shall be assessed, any debt or debts due and owing from such persons upon any mortgage made to the chancellor in his official capacity, or to the state of New Jersey for the investment of money in the court of chancery, upon claim of such deduction being made according to law. By the 3d section it is provided that the assessment shall be made to the person or persons having the beneficial interest in such mortgage or mortgages, or who may be entitled to have the income or interest thereof at the time of such assessment, whether such person or persons reside in this state or not. The 6th section is as follows: (§ 6) "In case any taxes assessed since the 4th day of July, 1879, upon any of the said mortgages [mortgages made to the chancellor in his official capacity, or to the state for the investment of money in the court of chancery] or the debt secured thereby to the person or persons for whom the same was or were at the time of the assessment held in trust by the chancellor in his official capacity, or the state for the investment of money in the court of chancery, or who then had, or were entitled to have, the beneficial interest or income from the same, shall be and remain unpaid, it shall be the duty of the person or persons who claimed deduction from the same, to pay such taxes to the collector of the township or city wherein the said deduction was made, and in case of the failure of such person or persons to pay the said taxes within ten days after demand, collection of the same may be enforced, the same as if they had originally been assessed upon his or their property; and the payment of such taxes shall operate as a payment, so far as the same will extend, on any interest or income due or to grow due on the mortgage debt." The next section (§ 7) provides that upon petition of the collector for the time being of any township or city to which any of those taxes assessed as mentioned in the act then were or

Cox's Case.

thereafter might be due and unpaid, it shall be lawful for the chancellor to make such order and take such means for the payment thereof out of the income or interest of the mortgage or debt secured thereby, on which the tax is assessed, as to him shall seem proper, and to enforce such order as in other cases. If the legislature had the power to validate the taxes imposed under the act of 1879, as I think it had (*Cooley on Taxation* 226), then these taxes must be regarded as having been lawfully assessed. Nor will the objection that it has been repeatedly held (*State, Richey pros. v. Shurts*, 12 Vr. 279; *State, Richey pros. v. Shute*, 14 Vr. 414) that such an interest as that of John S. Cox under the mortgage is in fact an annuity, and that the person entitled to it cannot be taxed for the fund out of which it arises, avail to overthrow or reduce the assessment; for the act of 1882 declares that assessment shall be made against the person having the beneficial interest in such mortgages, or who may be entitled to have the income or interest thereof, and that the owner of the property to whom the deduction is allowed, may, in case of failure of such person to pay the tax, pay it himself, and the payment shall operate as a payment on account of the interest on the mortgage. In view of this legislation, it is of no importance whether the interest of the person entitled to the interest of the mortgage be regarded as an annuity or not; for, whether it be annuity or interest, the legislature declares that the tax on the mortgage shall be assessed upon and paid by him. And if it had the constitutional power to make this enactment, as it undoubtedly had, the act governs the subject and fixes the tax on the life tenant.

D., L. & W. R. R. Co. v. Oxford Iron Co.

THE DELAWARE, LACKAWANNA' AND WESTERN RAILROAD
COMPANY

v.

THE OXFORD IRON COMPANY.

A mortgage was given on lands and also on the nail and other factories, *
* * machinery, * * * property and fixtures "thereon, or connected
therewith or relating thereto."—*Held*, that nail machines, grindstones, a pair
of shears, scouring machines, nail bins and grip levers—all used in manu-
facturing nails in the factory on the premises, and some of them permanently
fastened to the building, and the rest adapted to the factory—are fixtures and
go to the purchaser under the foreclosure of the mortgage; and also a duplicate
cylinder for a bluing machine and duplicate pulleys for the grindstones, kept
on hand for emergencies, although they may never have been in actual use.

. In insolvency. On petition of the receiver of the Oxford
Iron Company, for instructions in reference to certain property.
On petition and answers thereto.

Mr. F. McGee, for the receiver.

Mr. W. H. Jessup, of Pennsylvania, for the purchaser.

THE CHANCELLOR.

The Oxford Iron company, a corporation of this state, was,
under the act concerning corporations, in 1878 adjudged by this
court to be insolvent, and a receiver for its creditors and stock-
holders appointed. Before its insolvency, and in 1876, it gave
to the Farmers Loan and Trust Company a mortgage to secure
its bonds to the amount of \$750,000. By that mortgage it
mortgaged certain land and premises therein described, situated
in Warren county in this state, together with all and singular
the nail and other factories, and all the rolling and other mills,
foundries, furnaces, machine shops, buildings, machinery, rail-
roads, ores and other minerals, mines and mine openings, min-
eral and other rights, property and fixtures then upon, in and

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under, or in any way connected with or relating to, the lands and rights described in the mortgage, and all and singular the appurtenances and hereditaments thereto in any wise appertaining &c. The mortgage has been foreclosed by suit (in the United States circuit court) and the mortgaged premises sold under execution issued on the decree. A question has arisen between the receiver and the purchaser at that sale and his grantee, as to the character of certain fixtures in the nail factory on the premises; the latter insisting and the former denying that they are fixtures passing as and constituting part of the mortgaged premises. The property in dispute is one hundred and three nail machines, a duplicate bluing cylinder, twenty-three grindstones, a pair of shears, two scouring machines, eighty-seven nail bins, certain duplicate pulleys for the grindstones, and certain grip levers. The nail machines are situated on the first and second floors of the nail factory. That building was erected expressly to accommodate them, and has never been used for any other purpose. Sixty-three of them were put in when the building was erected, and the rest have been put in since, as they were required by the business, which was the manufacture of nails. The blast-furnaces, rolling mills, and the other shops and factories on the mortgaged premises were all used in that business—to supply the nail factory with material—nail plates, for the manufacture of nails. The nail machines are, as before stated, situated, part of them, on the first or ground floor of the factory, and the rest on the second floor. Each machine on the upper floor is bolted to the building by four heavy bolts, which run through as many hollow columns, one at each of the four corners of the machine from the height of about two and a half or three feet above the floor, and pass downward through the floor, and are fastened by heavy nuts on the under side of the floor. The bolts pass through beams—stringers running the whole length of the building—directly under the machines, and purposely so adjusted as to accommodate them. The stringers are heavy girders, and are supported by posts standing on the foundation of the building. The power to drive these machines is communicated by a double line of shafting, placed under the

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ceiling of the first floor, and connected by belts running upward through the floor to the machines on the upper floor, and downward to those on the lower. The belting on the second floor runs through holes cut in the floor close by each machine, expressly for the purpose, and passes around pulleys attached to the machines. The machines on the upper floor empty their product through chutes, passing through other holes in the floor, into bins placed in the room below for its reception. The machines on the lower floor are smaller, and are fastened to the floor, some with screws and some with spikes. They empty their product into movable basins set on the floor. The machines in the two stories of the building are connected together by the one line of shafting and the belting before mentioned. The grindstones are set in gangs, and weigh thirty-four thousand five hundred pounds. Nineteen of them are on the second floor. They are not bolted to the floor, but are fitted in frames built expressly for them. The frames sit on the timbers of the building, and the floor, which is of two-inch plank, is laid up to and around them, and spiked down. The stones are run by belting from the before-mentioned shafting in the same manner as the nail machines, and the floor is cut to admit the passage and operation of the belting for those of them which are on the second floor. Each stone has a separate belt and pulley. They are used in connection with the nail machines for the purpose of sharpening the nail cutters. Some of them are turned with beads, which adapt them to that use and that use alone. The bluing machine is used to finish the nails. It is by itself in a separate room, built expressly for it, and is anchored to a foundation of stone built into the ground, by bolts running through anchor plates under the foundation. The shears are used for cutting the nail plates into the proper lengths for the different sizes of nails, and are built on foundations of stone laid in cement, and are anchored fast to the foundations by bolts running through anchor plates under the foundation. They are run by the same power as the nail machines. The scouring machines are used for the finishing of the nails. They are cast-iron cylinders set in cast-iron frames, and rest on the floor of the factory, and are run by the same

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power as the nail machines. The nail bins are cast-iron boxes, cast for this mill. They rest on the floor on legs, and are fitted with grates, so constructed as to cleanse the products placed in them. All of the above-described articles together constitute the machinery and fixtures of the factory. The duplicates before mentioned are duplicate parts of the machinery, kept on hand as supplies in case of accident. Of these the duplicate bluing cylinder has been used, but the others have not, and are new.

The mortgage is not merely of the land, but also of the nail and other factories, * * * machinery, * * * property and fixtures, which at the time of making the mortgage were upon, in * * * or in any way connected with or relating to the lands and rights described in the mortgage, and all and singular the appurtenances * * * thereto in any wise appertaining &c. It was manifestly the intention of the mortgagor to mortgage the entire property, including the nail factory as such, for such are the terms of the instrument. A mortgage of a factory, *eo nomine* includes, *ex vi termini*, all the machinery and other articles essential to the factory. *Ewell on Fixt.* 308; *Teaff v. Hewitt*, 1 Ohio St. 511; *Potts v. N. J. Arms Co.*, 2 C. E. Gr. 395; *Voorhis v. Freeman*, 2 W. & S. 116; *Pyle v. Pennock*, Id. 390. And though in this case some of the nail machines were put in after the mortgage was given, they were actually annexed to the building and were applicable, and were, in fact, applied to the use to which it was appropriated, and were evidently intended as permanent additions to the freehold. They, therefore, were subject to the lien of the mortgage. As to all the rest of the property—that which was on the premises when the mortgage was given—it also was all of it essentially necessary to and part of the factory. The nail machines, the bluing machine, and the shears were all, in fact, actually annexed as permanent additions to the building for the purposes of the business for which it was designed, and to which it was appropriated. And so, too, as to the shafting and belting. The grindstones appear to be in the position in which they were placed originally, and where it is evident it was intended they should remain permanently. The floor is laid up to and spiked down around the frames

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which support them. They are necessary adjuncts and incidents to the nail machines, and so are the scouring machines, the nail bins, and the grip levers. The duplicate bluing cylinder and the duplicate pulleys for the grindstones (duplicates to answer emergencies) are also to be regarded as fixtures essential to the factory. *Voorhis v. Freeman*, 2 W. & S. 116. All the articles in question passed to the purchaser under the marshal's sale of the mortgaged premises.

JOHN A. VOORHEES, by his next friend, Charles M. Jameson,

v.

BERNARD M. POLHEMUS et al.

A next friend is entitled to be re-imbursed out of the estate of the person in whose behalf he sues, though his suit is unsuccessful, if it appears that he acted in good faith and with reasonable caution, and simply with a view to protect a person who was unable to protect himself.

On petition and notice.

Mr. John Schomp for application.

Mr. W. W. Anderson, contra.

VAN FLEET, V. C.

This is an application by the *prochein ami* of an habitual drunkard, to be re-imbursed, out of the estate of the drunkard, the taxed costs of an action he brought in this court on behalf of the drunkard, against the drunkard's guardian, and in which he was defeated.

The rule which I think must govern the decision of the application, is thus stated by Mr. Daniell: "The court is extremely anxious to encourage, to every possible extent, those who will

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stand forward in the character of next friend on behalf of infants, and will, whenever it can be done, allow the next friend the costs of any proceedings instituted by him for the infant's benefit, out of the infant's estate, provided he appears to have acted *bona fide* for the benefit of the infant." 1 *Dan. Ch. Prac.* 79. This rule is taken substantially from judgments pronounced by Lord Hardwicke and Lord Eldon. In *Whitaker v. Marlar*, 1 *Cox Ch.* 285, Lord Hardwicke held that no degree of mistake or misapprehension would be sufficient to charge a *prochein ami* with costs as against the infant's estate. He said: "Whoever will stand forward in that character on behalf of infants, is to be encouraged to every possible extent, while he can be supposed to intend the infant's benefit." Lord Eldon, subsequently, somewhat restricted the liberality of the rule, and held that a *prochein ami* was not, as against an infant's estate, entitled to the costs of an unsuccessful suit, when it appeared that he could, by the exercise of reasonable diligence, have ascertained, before suing, that there was no real ground of action. *Pearce v. Pearce*, 9 *Ves.* 548.

When a *prochein ami* has acted in good faith and with reasonable caution, and it appears that in coming forward as the champion of a person who, in consequence of his legal disability, was unable to maintain and defend his rights in his own name,

NOTE.—In the following cases the *prochein ami* was allowed costs: On dismissing the infant complainant's bill, *Taner v. Ivie*, 2 *Ves. Sr.* 466; on sustaining one of two suits for the infant's benefit and dismissing the other, *Cross v. Cross*, 8 *Beav.* 455.

Under some circumstances in chancery the *prochein ami* has been held liable for costs, *Jones v. Lewis*, 1 *De G. & Sm.* 245; *Sproul v. Botts*, 5 *J. J. Marsh.* 162; *Sikes v. Crissman*, 35 *Mich.* 96; *Waring v. Crane*, 2 *Paige* 79; *Ryder's Case*, 11 *Paige* 185; *Stephenson v. Stephenson*, 3 *Hayw.* 123; or not allowed costs if the suit appeared not to have been instituted for the infant's advantage, *Clayton v. Clark*, 3 *De G. F. & J.* 682.

Ordinarily, the infant himself pays no costs in chancery, *Perkins v. Hamond*, 1 *Dick.* 287; *Smith v. Smith*, 13 *Mich.* 258; but see *Turner v. Turner*, 2 *P. Wms.* 297; *Anonymous*, 4 *Madd.* 461; *Price v. Sykes*, 1 *Hawks* 87.

At law, an infant is liable for costs, *Gardiner v. Holt*, 2 *Stra.* 1217; *Thrustout v. Percivall*, *Barnes* 183; *Finley v. Jowl*, 13 *East* 6; *Dow v. Clark*, 1 *Cr. & Mees.* 860; *Evans v. Davis*, 1 *Cr. & Jer.* 460; *Lane v. Norris*, 1 *Harr. & McH.*

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he was influenced solely by a desire to protect a defenceless person, there is not only manifest justice in re-imbursing him for his outlay, out of the estate of the person whose interests he has unsuccessfully attempted to protect, but such a rule of practice is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress. The right to re-imbursement does not at all depend upon the special cause which produced the disability. The rights of the *prochein ami*, in this respect, are the same whether the disability of the person whom he has sought to protect arises from infancy, non-sane mind or drunkenness.

The question then to be decided on this application is, did the next friend in this case act in good faith, with reasonable caution, and with a view to protect the interests of the person in whose behalf he brought the suit? The suit was brought to prevent the guardian from completing a sale of standing timber, belonging to the estate of the drunkard, at a price which it was alleged was grossly inadequate. The auctioneer who conducted the sale of the timber, swore to a state of facts which, if true, rendered it entirely certain that the guardian was either wantonly indifferent to the interests of his ward, or was attempting, by means

459; *Beasley v. State*, 2 Yerg. 481; but see *Grave v. Grave*, Cro. Eliz. 33; *Turner v. Turner*, 1 Stra. 708; *Bouche v. Ryan*, 3 Blackf. 472; *Smith v. Floyd*, 1 Pick. 275; *Howell v. Alexander*, 1 Dev. 431; as well as the *prochein ami*, *Slaughter v. Talbott*, Willes 190; *Newton v. London R. R.*, 7 Dowl. & L. 328; *James v. Hatfield*, 1 Stra. 548; *Marnell v. Pickmore*, 2 Esp. 473; *Hawkes v. Cottrell*, 3 H. & N. 243; *Sinclair v. Sinclair*, 13 M. & W. 640; *Perryman v. Burgster*, 6 Port. 99; *Smith v. Gaffard*, 33 Ala. 169; *Wilson v. McGee*, 2 A. K. Marsh. 600; *Yeizer v. Stone*, 7 Mon. 189; *Soule v. Winslow*, 64 Me. 518; *Blood v. Harrington*, 8 Pick. 552; *Baltimore and Ohio R. R. v. Fitzpatrick*, 36 Md. 619; *Dalrymple v. Lamb*, 3 Wend. 424; *Mason v. McCormick*, 75 N. C. 263; *Vance v. Fall*, 48 Iowa 364; but see *Leavitt v. Bangor*, 41 Me. 458; *Crandall v. Slaid*, 11 Metc. 288; *Brown v. Hull*, 16 Vt. 673; see, also, *Cotchal ads. Morehouse*, 1 Zab. 335.

In some states it is now regulated by statute, *Holmes v. Adkins*, 3 Ind. 398; *Tague v. Hayward*, 25 Ind. 427; *Klaus v. State*, 54 Miss. 646; *Cook v. Radon*, 6 How. Pr. 233; *Linner v. Crouse*, 61 Barb. 289.—REP.

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of the sale, to take a fraudulent advantage of him. The case made by the affidavit was strongly calculated to arouse the sympathy and indignation of any person who hated wrong and loved justice. Its statements need not be repeated. Being made under the sanctity of an oath, I think the next friend was bound to believe them, and if he did believe them he was unquestionably justified in going to the rescue of the helpless person whose interests were represented to be imperiled. The auctioneer subsequently made another affidavit, in which he falsified every material statement set forth in his first. The last, it now appears from other affidavits in the case, is the more truthful of the two. The suit of the next friend failed, because the sworn statements which induced him to sue turned out to be false. I think his right to be re-imbursed is clear.

JEREMIAH C. SWEENEY

v.

WASHINGTON B. WILLIAMS, receiver of Mechanics and
Laborers Savings Bank of Jersey City.

The president of a savings bank abstracted a large amount of its securities. He afterwards fraudulently conveyed a farm to one of the active managers of the bank, who was cognizant of the whole transaction, receiving from him a bond and mortgage as part of the pretended purchase-money. The president, then, in order to make an apparent partial restitution, and to secure the bank for his malfeasance, assigned the bond and mortgage to the bank, with the knowledge of the manager, who paid to the bank the interest thereon as it fell due with money given to him by the president. The bank subsequently was placed in a receiver's hands.—*Held*, that this court will not enjoin the receiver's proceeding at law to obtain judgment against the manager on the bond, on the ground that the bond is without consideration.

On final hearing on bill, answer and proofs taken in open court.

Sweeney v. Williams.

Mr. Gilbert Collins, for complainant.

Mr. Washington B. Williams, pro se.

VAN FLEET, V. C.

The defendant is the receiver, appointed by this court, of the Mechanics and Laborers Savings Bank of Jersey City, an insolvent corporation. Among the assets which came to the defendant's hands, were a bond and mortgage made by the complainant to one John Halliard for \$10,000, bearing date November 1st, 1876, and which Halliard had assigned to the bank by an assignment bearing date April 19th, 1877. The defendant has brought an action at law against the complainant on the bond, and the object of this suit is to have that action perpetually enjoined. The complainant puts his right to the relief he asks on a single ground, namely, that the bond is without consideration. The bill also charges that he was induced to execute the bond by fraud, but as this charge is wholly unproved, it may be dismissed without further remark.

At the time the bond and mortgage were executed, the complainant and Halliard were both officers of the bank—Haliard was its president, and had been for several years, and the complainant was a member of the board of directors, and had also been a member of the executive committee of the board since November, 1875. Halliard had been allowed to manage the affairs of the bank in his own way, and without being required to report his transactions to the board. At a meeting of the executive committee, held on the 15th of February, 1877, it was found that Halliard had abstracted a number of securities belonging to the bank, representing in value a large sum of money. He promised to secure the bank as soon as possible. The complainant was at this time chairman of the executive committee; he professed to have full confidence in Halliard's honesty, and advised the committee "to act very quietly," and not press Halliard, as a contrary course would be productive of no good, and might result in injury to the bank. His advice was adopted. No action was taken against Halliard, and no time was fixed

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within which he should secure the bank; nor was he required to disclose the character or nature of the security he intended to offer. His powers were neither suspended nor curtailed, nor was any time appointed for a subsequent meeting of the committee, when his misconduct should be further considered, and more definite action taken. The advice that the committee should act very quietly seems to have been understood that they were to take no action whatever, but dismiss the matter entirely, and let Halliard take such course, in furnishing security, as his sense of duty might dictate.

The bond and mortgage were actually executed on the 17th of April, 1877, though dated November 1st, 1876. The circumstances attending their execution are thus described by the complainant: He says Halliard told him that he had a paper at the office of the counsel of the bank, which he wanted him to sign; that he inquired what the paper was, and that Halliard replied he wanted to put his Morristown farm in complainant's name, but he must not ask too many questions; that what he wanted complainant to do was only a matter of favor, it was all right and he would take care of it. The complainant says, without further inquiry or investigation, he executed the bond and mortgage. Shortly afterwards, Halliard conveyed the farm covered by the mortgage to the complainant, for a consideration, as the deed states, of \$30,000. The mortgage states that it was given to secure a part of the purchase-money of the mortgaged premises. These papers are false. No sale of the farm was made to the complainant, nor was the deed for it ever formally delivered to him. The complainant says he never saw the bond and mortgage after he executed them, and that the first knowledge that he received that the bank held them, came in the form of a notice from the bank that six months' interest was due and must be paid. On receiving this notice, the complainant went to Halliard and asked him what it meant; Halliard replied it was all right, he would take care of it, and then gave the complainant sufficient money to pay the interest, which the complainant immediately paid to the bank. This payment was made October 31st, 1877.

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A subsequent payment of interest was made on the 9th of May, 1878, by the complainant, with money furnished by Halliard. Halliard delivered the bond and mortgage to the bank some time prior to the 31st of October, 1877; they were laid before the finance committee, accepted and credited to Halliard as a payment of \$10,000 on that part of his indebtedness which he incurred by the abstraction of \$20,000 in United States bonds. From the time the bond and mortgage were accepted, they were treated, with the knowledge of the complainant, as an asset of the bank. Two divisions of profits were subsequently made—the first in November, 1877, and the last in May, 1878—and in each instance, in ascertaining the surplus which remained for distribution among the depositors, the bond and mortgage were treated not only as an asset, but as worth their full face. The complainant was present at the first of these meetings, and participated in deciding what dividend should be declared. He admits that he never informed his fellow directors or managers, or any other officer of the bank, of any of the facts connected with the execution of the bond and mortgage, or that they were open to question, or subject to any defence whatever, until after the bank failed.

As between the complainant and Halliard, it must be admitted that these papers are without the slightest legal force, and it must also be conceded that, as a general rule, the assignee of a non-negotiable chose in action takes it subject to all the equities which could be urged against it in the hands of the person to whom it was originally given. But there is another proposition of law pertinent to this case which needs to be stated. It is this: if the bond and mortgage were executed by the complainant for Halliard's accommodation, and Halliard was not restricted in the use he should make of them, then while it is true so long as they remained in Halliard's hands they were without legal force, yet the moment Halliard transferred them in good faith for his own accommodation, whether they were transferred for a money consideration actually paid, or in satisfaction of a pre-existing debt, or only as security for such a debt, they became, in the hands of the transferee, a living, valid and effectual security.

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Jacobsen v. Dodd, 5 *Stew. Eq.* 403; *Lee v. Kirkpatrick*, 1 *McCart.* 264; *Westervelt v. Scott*, 3 *Stock.* 80.

The important question then is, do the facts bring this case within the last proposition? The complainant's own evidence renders it entirely clear that the bond and mortgage were made for Halliard's accommodation. They were executed to be used. This is proved conclusively by the form of the papers themselves. They were put in form to represent a sale of the farm to the complainant, for a large price, and the return of a mortgage for part of the purchase-money. Halliard was not restricted in the use he should be at liberty to make of them. He says he procured them to be made for the purpose of assigning them to the bank, and that he intended to tell the complainant what use he intended to make of them, but he will not say positively that he did tell him. The circumstances would seem to show, with reasonable certainty, that the complainant understood what use was to be made of them. He knew that Halliard was liable to the bank for a large sum of money, and that he had promised to give security for it. With a strong profession of confidence in Halliard's honesty, he had advised his fellow managers not to press Halliard. When he is notified that the bank has the bond and mortgage, he does not express surprise, nor charge Halliard with bad faith, nor claim that the use Halliard had made of them was a misappropriation. Halliard had promised to take care of them, and when he finds that Halliard had not paid the interest—that he had not taken care of them in that respect—he asks Halliard what it means, but he does not pretend that the use Halliard had made of them was contrary to his understanding or expectations. His subsequent conduct, in allowing them to be dealt with as an asset of the bank, and in concealing from his fellow managers the facts on which he now seeks to escape liability, would seem to furnish almost conclusive evidence that the use made of them was just such as he had understood and expected would be made of them.

A question ably discussed by the counsel of the complainant, namely, whether the consideration paid by the bank was sufficient to impart to it the character of a purchaser for value, so as

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to raise it to a position superior in equity to that occupied by its assignor, is not, in my judgment, involved in the case. The general rule undoubtedly is, that where a non-negotiable chose in action, void between the original parties, is assigned as security for a pre-existing debt, the assignee is not a holder for value, so as to be exempt from defences which might be successfully urged against his assignor, but a different principle prevails where the thing assigned is the obligation of a third person, and the transfer is not made simply as security, but in discharge of the debt and the original debtor thereby released. Chancellor Zabriskie, in *Uhler v. Semple*, 5 C. E. Gr. 293, said: "The rule that a prior debt is not sufficient to make one a *bona fide* purchaser or mortgagee for value, has never been adopted in New Jersey. Our courts have uniformly held that it is a sufficient consideration to protect one holding the legal right against the prior equity of one who has no legal right, when the other has no notice of such equity." The present chancellor has, in a recent case, re-affirmed and enforced this doctrine. *Traphagen v. Hand*, 9 Stew. Eq. 384. But, as already remarked, the question of the sufficiency of the consideration paid by the bank to constitute it a holder for value, is not, as I think, at all material in determining the rights of the parties. It cannot be disputed, if the bond and mortgage had been made by the complainant directly to the bank, that no question could have been raised as to the sufficiency of their consideration, and it is admitted by the counsel of the complainant that if they had been made to Halliard, with the understanding that they were to be assigned to the bank, either in discharge of, or as a security for a pre-existing debt, the complainant would be bound by them. The case, in principle, on its undisputed facts, stands, I think, quite as strongly against the complainant as it would in either of the cases just mentioned. He executed the bond and mortgage for Halliard's accommodation, and gave him authority to use them for any purpose he saw fit. Under an authority so comprehensive, whether Halliard transferred them for a money consideration, or as security for, or in payment of a pre-existing debt, is wholly immaterial; in either

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case his use of them was within the purposes for which they were made, and therefore legitimate and effectual.

Where a mortgage is made by one person for the benefit of another, under an understanding that it shall be used for a specific purpose, it must be applied exclusively to that purpose, and any other disposition of it will be regarded as a fraudulent misappropriation of it, and discharge the mortgagor. *Andrews v. Torrey*, 1 *McCart*. 355; *Atwater v. Underhill*, 7 *C. E. Gr.* 599. But where it is given for the accommodation of the mortgagee generally, without restriction or direction as to how he shall use it, he is authorized to use it for any honest purpose, and a transfer of it to his creditor, either in payment of or as security for a pre-existing debt, will pass a title, which, in my judgment, the mortgagor cannot successfully dispute.

But I think I am also bound to say that there is nothing in the conduct of the complainant, in this transaction, which entitles him to favor, or which should induce a fair mind to be eager in trying to help him escape liability. He is chargeable with full knowledge of the contents of these papers at the time he executed them. He does not pretend that the officer before whom he executed them did not faithfully perform his duty.

A person who executes instruments of the nature of those under consideration, is bound to look and see what they are before he signs them, and if he willfully shuts his eyes, or rashly closes his ears when he has a full opportunity to see everything, or to know everything, he must submit to the consequences of his folly. The complainant allowed the papers to represent a condition of affairs which he knew to be false, and which he also knew would give them a currency and credit they were not in fact entitled to. He allowed them to be clothed in that sort of false garb which was best calculated to render them successful as instruments of deception. The law justly declares that he who enables another to commit a fraud, shall himself be answerable for the consequences of the fraud. If the complainant, by first furnishing Halliard with these papers, and afterwards, after they were assigned to the bank, by his acts and by his silence, designedly produced a false impression as to their real character,

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to the injury of the bank, it is clear he is not entitled to the aid of a court of equity against the bank. This would be so, even if, when he did the acts and was guilty of the concealment, he had been under no duty to guard and protect the interests of the bank, but he was then under such duty. He was one of the managers of the bank, and as such was charged with the duty of seeing that no invalid or worthless security was put off on the bank. If, while thus in a position where his duty required him to be vigilant and faithful, he stood silently by and allowed his own obligations, which he knew to be invalid, to be passed to the bank as valid, and after the bank received them, by repeated acts affirmed their validity, neither honesty nor justice will now allow him to dispute their validity. He cannot play fast and loose; he cannot treat the papers as valid so long as he thinks there is no danger in doing so, and then, when danger appears, turn upon himself and say all that he had previously said by his acts and by his silence was false, and that the papers never possessed the slightest validity. In such a case he must be held to be concluded by his conduct.

This is a case in which, I think, this court might very properly decline jurisdiction, because its aid is not necessary to the protection of the complainant. An action at law had already been commenced when the complainant filed his bill, the plaintiff in that action is an officer of this court, and must, in the proper discharge of his duty, prosecute his action diligently. The ground on which the complainant asks the aid of this court, will, if established, be just as effectual as a defence to the action at law as it can possibly be as a ground of relief here. If he is successful in his defence at law, his bond will be adjudged to be without legal force, and should he desire its surrender, and the receiver refuse to give it up, this court will, in a summary way, direct its surrender; it would seem, therefore, to be entirely clear that there is nothing in the case which renders a resort to equity either necessary or expedient. While a court of equity will undoubtedly take jurisdiction in certain cases of the class to which this suit belongs, even though a complete defence at law may exist, yet it is equally certain that it will not do so simply

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for the purpose of changing the forum of litigation. If an action at law has already been brought when the suit in equity is brought, the latter tribunal will not withdraw the litigation from the former, unless it satisfactorily appears that adequate relief cannot be given at law, or that the defence is of a character which cannot be made at law without embarrassment or serious hazard. *Cornish v. Bryan*, 2 Stock. 146; *Smith v. Smith*, 3 Stew. Eq. 564. The principle which controls courts of equity in such cases is laid down by Chancellor Kent as follows: "The resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper, and clear of all suspicion of any design to promote expense and litigation." *Hamilton v. Cummings*, 1 Johns. Ch. 523. It is manifest, I think, that not a single one of the conditions on which a court of equity will withdraw a litigation from another tribunal, can be found in this case, and if this court interferes, it must do so causelessly.

The complainant is not, in my judgment, entitled to the relief he asks; his bill must, therefore, be dismissed, with costs.

WILLIAM L. ELKINS

v.

THE CAMDEN AND ATLANTIC RAILROAD COMPANY et al.

Where the charter of a corporation provides that annual meetings for the election of directors shall be held by the stockholders, the directors cannot by a by-law so change the time of holding the annual election that they will continue themselves in office more than a year, against the wishes of the holders of a majority of the stock.

On application for an injunction. Heard on bill and affidavits and answer and affidavits.

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Mr. S. H. Grey, for complainant.

Mr. P. L. Voorhees and *Mr. B. Williamson*, for defendants.

VAN FLEET, V. C.

The complainant seeks to prevent the directors of the defendant corporation from continuing themselves in office, against the will of the holders of a majority of the stock, for a period beyond the term for which they were elected. The directors against whom he asks the court to exert its power were elected on the 23d day of February, 1882, for the term of one year. Their term of office will, consequently, expire on the 22d day of February, 1883. The charter provides that annual meetings of the stockholders shall be held for the election of directors, and that each share of stock shall be entitled to one vote. For some years prior to 1881, the annual meeting for the election of directors was held on the fourth Thursday of October in each year, but on the 21st of July, 1881, the directors adopted a by-law, changing the date from the fourth Thursday of October to the fourth Thursday of February. The change thus made, so far as the record in this case shows, was acquiesced in by the stockholders, and the present board was elected on the day so designated. On the 19th day of October, 1882, the present board attempted, by resolution, to change the time of the annual meeting from the fourth Thursday of February to the fourth Thursday of October. This action is the grievance of which the complainant complains.

The effect of the change, it will be perceived, is to increase the term of office of the persons who attempted to make it, from one year to one year and eight months, nearly double the period for which they were elected. And this they have attempted to do without the consent of the proprietors of the corporation, except so far as they may happen to be represented by the persons constituting the board of directors. If they may lawfully do what they have attempted, it is difficult to perceive why they may not a month, more or less, before the day now fixed, make another change, and so continue changing the day from time to time, as long as they may find it agreeable to continue in office, and thus abso-

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lutely deprive the proprietors of the corporation of that provision of the charter which secures to them the right to designate annually the persons who shall manage the affairs of the corporation. That provision of the charter which declares that annual meetings of the stockholders shall be held for the election of directors, grants to the stockholders a highly important and valuable right, which the directors can neither defeat nor impair. It gives the stockholders the right to say, once in each year, not once in eighteen months, or two years, by a vote of a majority of shares, who shall be elected directors, and as such have the conduct and management of the business of the corporation for the next year. The right, therefore, to change the day for the annual meeting is one which, from its very nature, can alone be exercised by the stockholders. No board of directors can, without the stockholders' consent, hold office for a period longer than one year.

It is not perhaps necessary that the stockholders should be called together specially for the purpose of making a change in the day. If the directors should attempt to change the day, as they did in 1881, and the stockholders should subsequently meet on the day so designated, and proceed without objection or remonstrance to the election of a board of directors, their action would probably be entitled to be regarded as furnishing conclusive evidence of assent. I think the day so designated would be entitled to be regarded as the day fixed by the stockholders, and that the subsequent meetings should be held on the day so fixed.

The object of the directors in attempting to defer the next annual meeting is perfectly obvious. The complainant now holds a majority of the stock issued by the defendant corporation, he and the directors are at variance, the complainant has been compelled to appeal to this court in two previous instances to be protected against the consequences of the wrongful acts of the directors, he means, undoubtedly, to use the power he possesses, as the holder of a majority of the stock, to prevent their continuance in office, and they unquestionably resorted to the device of attempting to change the day of the annual meeting for the purpose of prolonging their term of office. If it were entirely clear that they possessed the power to do what they have at-

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tempted to do, I think their use of it under the circumstances and for the purposes stated, would deserve to be denounced as fraudulent. There can be no doubt about the relations which the directors of a corporation hold to its stockholders. They are trustees. *Stewart v. Lehigh Valley R. R. Co.*, 9 Vr. 505. And like all other persons entrusted with fiduciary powers, they are bound to use their authority for the maintenance of the rights and the protection of the interests of their *cestui que trust*. To attempt to use their power for their own personal advantage, to the injury of their *cestui que trust*, is an abuse of the confidence reposed in them, which entitles the *cestui que trust* to the protection of a court of equity; and if they attempt, by means of their power or position, to deprive the *cestui que trust* of any of his rights, their act, in its legal consequences, regardless of the motive which prompted it, is a fraud. Chancellor Green, in *Hilles v. Parrish*, 1 McCart. 380, declared that any action by the directors of a corporation, which was designed to retain themselves in office, and thus perpetuate their control over the affairs of the corporation, against the will of the holders of a majority of the stock, was illegal and void, and that the injured stockholders, in such a case, were entitled to relief by injunction.

The action of the directors under consideration was not only wholly without warrant of law, but was unquestionably designed to defeat the stockholders in the exercise of a right granted to them by law. The directors intended that their action should serve as an excuse for not calling the stockholders together at a time when the stockholders had a right to have an annual meeting held. In order to frustrate that purpose it is necessary that this court should act. An injunction must go, enjoining the directors from doing anything which will defeat or prevent a meeting of the stockholders from being held for the election of directors on the 22d day of February, 1883.

Green v. Hathaway.

ANNA GREEN

v.

WILLIAM HATHAWAY.

Lands of a decedent were ordered to be sold in partition and the proceeds divided among his four surviving children and two grandchildren, who were to take the share of their father, decedent's son Benjamin, who died after his father. Benjamin, whose estate is insolvent, was indebted to his father \$10,000 for moneys advanced, and had given notes and a mortgage therefor.—*Held*, that Benjamin's declarations to third persons that he supposed his indebtedness to his father's estate would be deducted from his share thereof, were not sufficient to off-set that indebtedness against his children's share of the lands.

On hearing on petition, order to show cause and depositions.

Mr. W. H. Vredenburg and *Mr. J. D. Bedle*, for petitioner.

Mr. James Steen, contra.

VAN FLEET, V. C.

'This is a partition suit. William Hathaway died intestate in the month of December, 1876. His heirs-at-law were his four children, and two of his grandchildren. The two grandchildren were children of his son Benjamin. Benjamin died about two months before his father. An actual partition of the lands left by William Hathaway among his heirs-at-law, has been found to be impracticable without great injury to their interests, and the lands have, in consequence, been sold, and the proceeds of sale are now ready for distribution. Benjamin, at the time of his death, was indebted to his father in a sum exceeding \$10,000, for which his father held three promissory notes and two bonds. The payment of one of the bonds is secured by a mortgage on lands. The notes and bonds all provide that interest shall be paid on the debts which they evidence from their respective dates.

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On hearing on petition, order to show cause and depositions.

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Green v. Hathaway.

Benjamin's estate is insolvent. John C. Hathaway, one of the children of William, has presented a petition, alleging that the sum which represents the debt of Benjamin to his father, or some part of it, was advanced by the father, under an agreement by Benjamin with his father that to the extent of the sum so advanced he would make no claim to a share of his father's estate, and praying that the sum so advanced to Benjamin shall be deducted from the share to be distributed to his two children, and divided among the four children.

The proceeds of sale in question are to be regarded as land. The lands were converted into money simply as a means of making partition, but for no other purpose. The question to be decided is to be dealt with in the same manner as though the thing to be divided still remained land. The court may, in adjusting the rights of heirs-at-law under the statute regulating the descent of real estate, when it appears that the ancestor has given or advanced any part of his "lands, tenements or hereditaments," to one or more of his issue, adjudge that the issue so advanced is barred of his right of inheritance to the extent of the land so given or advanced, but in order to warrant such an adjudication the thing given or advanced must be lands, tenements or hereditaments. *Rev. p. 297 § 1*. That is the plain language of the statute, and in the words of Chancellor Zabriskie: "There is no authority or decision for extending this provision beyond the clear meaning of the words." *Havens v. Thompson*, 8 C. E. Gr. 321. The same construction was adopted in *Linell v. Linell*, 6 C. E. Gr. 83. It is manifest, then, that the claim of petitioner rests exclusively on the agreement set up by him, and if it cannot be maintained on that, it cannot be maintained at all.

This court has already decided that an agreement by a child with its father, by which, in consideration of a sum of money presently paid by the father, the child agrees to make no claim to a share of its father's estate, in case he dies intestate, is valid, and may be enforced in equity, at the instance of the other children, should an attempt be made to assert a claim in violation of the agreement. *Havens v. Thompson*, 11 C. E. Gr. 383.

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The justice of this doctrine is obvious. It is designed, in the first place, to compel the child to abide by its promise, and thus prevent the first expectations of the father from being disappointed—but for his trust in the promise he would have made a will—and in the second place to secure equality of division among those who have equality of right. But such agreements, when they concern or affect lands, are, like all others, subject to the statute of frauds, and unless they are in writing cannot be enforced. They may be inaptly expressed, or inartificially drawn, but if they are in writing, and the court can, with the aid of the surrounding circumstances, discern with reasonable certainty the meaning of the parties, it will carry them into effect, but not otherwise.

The proofs in this case, in my judgment, are wholly insufficient to establish any agreement whatever. There is no claim that there is anything in writing between the parties, except the notes and the bonds and the mortgage; and they are in the form in which such instruments are usually drawn, and contain nothing showing, even remotely, an agreement of the kind claimed. The proof in support of an oral agreement is nearly as scanty. There is not a word of evidence tending to show that the father and son ever came together for the purpose of negotiating such an agreement, and there is none that they ever made such an agreement. The evidence which it is insisted warrants the belief that such an agreement existed, consists of declarations by the son to third persons, that he was indebted to his father, and if he did not pay him, the papers which he had given would come against his share of his father's estate, or that he supposed or expected that the money which his father had advanced to him would be deducted from his share of his father's estate. But this, it will be observed, when interpreted most favorably for the petitioner, shows simply an expectation or a supposition, and not a promise or compact. The petitioner has failed to prove the agreement alleged, and his petition must therefore be dismissed, with costs.

But had a different conclusion been reached on the facts, it is impossible for me to see how any relief could have been given

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to the petitioner in the present condition of the record. By the final decree made in this cause, the two grandchildren are each adjudged to be entitled to and to stand seized in fee of the equal undivided one-tenth part of the land sought to be partitioned. So long as that decree remains in force, it must be taken as fixing finally and conclusively the share or proportion of the proceeds of sale that the court must order to be paid to them. The petitioner does not ask to have the final decree opened or set aside. If the grandchildren were each entitled to have one-tenth of the lands set off to them in severalty, the court is bound, I think, so long as the final decree stands in that form, to see that they each get the same proportional share of the proceeds of sale.

HENRY WHITENACK

v.

MARTHA WHITENACK.

1. In a suit for divorce, for adultery, a decree should not be granted on the uncorroborated evidence of a witness standing to the parties in the relation of an accomplice.

2. Where the conduct of a defendant in a suit for divorce admits of two interpretations, equally consistent with probability, one involving guilt and the other consistent with innocence, the court should always adopt that which favors innocence.

On final hearing on bill and answer, and proofs taken in open court.

Mr. W. Anderson and Mr. Alvah A. Clark, for complainant.

Mr. John L. Connet and Mr. John D. Bartine, for defendant.

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VAN FLEET, V. C.

This is a suit for divorce *a vinculo*. The husband is the suitor ; he charges his wife with adultery, and asks that their marriage be dissolved for that cause. The case presents simply a question of fact.

The evidence offered in support of the charge is both direct and circumstantial. There can be no doubt that if the direct proof is believed, the guilt of the defendant is established. It places the defendant and her paramour together in her bed-room, and keeps them there, alone, for from one to two hours. This was a frequent occurrence, taking place as often as twice a week, sometimes in the day-time, but most frequently at night. On one occasion they were seen together on the bed. This, however, occurred subsequent to the time when the adulterous acts charged in the bill were committed, and can, therefore, have no effect as evidence, except as it may serve to show what were the probable relations of the parties prior to that time. The direct evidence comes entirely from the mouth of a single witness, and if it were all the proof there was in the case, except the testimony of the defendant and her paramour, I think the defendant would be entitled to a dismissal of the bill. This witness admits that he served the paramour as pimp or procurer. He confesses that he was the pliant instrument of the paramour during the whole period of his adulterous intercourse with the defendant. He acted as their medium of communication, carrying messages, both written and oral, from one to the other ; he frequently stood guard over them while they were satiating their criminal passions, and he watched the husband, as spy for the paramour, to enable him to arrange his assignations with the defendant, so as to prevent detection. If his evidence was true, he is the accomplice of the parties, and, in my judgment, stands on a much lower moral plane than they do ; they violated decency and duty to gratify their sensual passions ; he, simply for the pleasure he derived from pandering to licentious desires of others. The security of the citizen, as well as the safe administration of justice, alike demand that the testimony of such a witness should be discredited, unless its

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truthfulness, in the main, is made certain and clear by other evidence. There is such confirmatory evidence in this case.

The circumstantial evidence, when considered in connection with the direct evidence and the evidence of the defendant and her paramour, leaves no doubt whatever of the truth of the complainant's charge against his wife. The complainant, at the times when it is alleged the acts of adultery were committed, was employed as a fireman on the Central Railroad of New Jersey, and was necessarily absent daily from his home from about three o'clock in the afternoon until about two o'clock in the morning. It is proved beyond all reasonable doubt that almost daily, during the time when her husband was absent, the defendant's paramour visited her, and remained with her sometimes as late as nine o'clock at night. It is also clearly proved that these visits were continued after the complainant had notified the defendant that they were the subject of unfavorable public comment, and that he wished them stopped, and after the defendant had promised him that they should be stopped. It is also proved in such manner that the truth of the evidence can neither be disbelieved nor doubted, that the defendant and her paramour were together at night in secluded and unfrequented places, where they would not be likely to have gone for any honest or innocent purpose. The defendant and her paramour both positively deny that there was any intercourse between them, except the most casual, after the complainant told the defendant he wanted her paramour to cease his visits. But the weight of the evidence is so overwhelmingly against them on this point as to leave no doubt whatever on my mind that what they say in that regard is not true. Their denials are contradicted by so many witnesses of character and credit, and by a mass of evidence so positive and persuasive, that nothing short of an arbitrary and unreasoning rejection of what appears to be truth, can relieve the mind from the conviction that their denials are untruthful. This conclusion renders the duty of the court plain. Perhaps the mere fact that these persons were together in lonely places, or that they were frequently together at night at the home of the defendant, when her husband was absent, would not

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of itself, standing alone, furnish evidence sufficient to justify the court in declaring that they had committed adultery, but when you add the further fact that they deny that they were together at all, and that their denial is shown to be false, all doubt respecting the purpose of their meetings is removed. Falsehood is the shield of guilt.

This is not a case where the conduct of the defendant shows that she has merely been indiscreet or imprudent, but that a reasonable and just mind, fairly weighing and considering all the facts, may still believe her to be innocent. It is undoubtedly true that where the conduct of a defendant in a divorce case admits of two interpretations, equally consistent with probability, one involving guilt and the other consistent with innocence, the court should always adopt that which favors innocence. But here the direct and circumstantial evidence, when combined, preclude the possibility of innocence.

My judgment is, adultery is proved. The complainant is entitled to a decree.

ALFRED LISTER AND EDWIN LISTER

v.

THE NEWARK PLANK ROAD COMPANY.

1. The right of the public to use the navigable waters of the state for the purposes of navigation, is a right given by nature, and can only be taken away by legislation.

2. Except so far as congress may see fit to interfere for the regulation of commerce, each state has exclusive jurisdiction over the navigable waters lying within its territorial limits, and may pass such laws regulating their use as to it may seem wise.

3. The statute of 1874 (*Rev. p. 87 § 13*), providing that navigation in certain cases may be obstructed, does not authorize the owners of a bridge over a navigable stream to close the draw of their bridge so as to entirely stop navigation, unless the work required to be done to their bridge is of a nature or character which cannot be done properly and with reasonable dispatch with the draw open.

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4. Which means of travel—the highway across the stream. or highway up and down the stream—is to be preferred, is a question which can only be decided by the legislature.

On application for injunction, heard on bill and affidavits and answering affidavits on the part of the defendants.

Mr. Andrew Kirkpatrick and Mr. F. H. Teese, for complainants.

Mr. William H. Bradley, for defendants.

VAN FLEET, V. C.

The defendants, under legislative authority, have constructed a bridge over the Passaic river, at Newark. It forms a part of their line of plank road extending from Newark to a point opposite the city of New York, in the county of Hudson. As directed by the act under which it was built, the bridge is constructed with a draw for the passage of vessels up and down the river. The bridge needs repairs, and the defendants claim that they cannot be properly and expeditiously made unless the draw is kept in one position while the repairs are in progress. They have given public notice that they intend to close the draw and keep it closed until the repairs are completed. The complainants own a dock on the river, and are engaged in the manufacture of fertilizers at a point near where their dock is located. They employ four hundred men. They own three iron steamers, which they use in transporting their manufactured goods to the city of New York, and in bringing back raw material to their works. They show that they must have fresh supplies of raw material daily or their business must stop. During the period the draw is closed they cannot use their steamers. They ask to have the defendants enjoined from closing it.

The complainants do not claim that what the defendants threaten to do will deprive them of any right which they hold by virtue of a federal law. They do not allege that their vessels are enrolled and licensed under the acts of congress regulat-

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ing navigation, and therefore have a right, at all times, of free passage over any of the navigable waters of the United States, but they base their right to the judicial action they seek solely on the ground that what the defendants threaten to do is unauthorized. The Passaic river is a public highway, over which the complainants have a right, at all times, to navigate their vessels, free from all obstructions except such as the legislature may have authorized to be placed therein. The right of the public to use the navigable waters of the state, for the purposes of navigation, is a right given by nature, and is said to exist of common right, or by common law, and can only be taken away by legislation. Except so far as congress may see fit to interfere for the regulation of commerce, each state has exclusive jurisdiction over the navigable waters lying within its territorial limits, and may pass such laws regulating their use as to it may seem wise.

It will thus be seen that the material question presented by this application is, Have the defendants legislative authority for what they declare they intend to do? They have given public notice that they intend to close the draw of their bridge, and to keep it closed for the space of four days or more. With the draw closed, navigation beyond their bridge, either way, will be effectually closed. If the defendants are without authority of law for what they threaten to do, their act will deprive the complainants of a clear and important legal right, and the loss they will in consequence sustain is, according to the undisputed facts of the case, clearly of the kind usually denominated irreparable. It is not disputed that the defendants' bridge needs repairs, and it will be assumed, for present purposes, that during the period the repairs are in progress it will be necessary that the draw should be kept in a fixed position, either open or closed.

The defendants were chartered in 1849. *P. L. of 1849 p. 105.* They were authorized to establish a ferry on the Passaic river, and for that purpose they were authorized to build piers and other necessary works in the river, provided that the free and uninterrupted navigation of the river was not in any manner whatever obstructed. They were expressly prohibited from building a bridge. In 1855, by a supplement to their charter,

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they were authorized to construct a bridge, but it is expressly provided that the bridge shall have a draw, with two openings of sixty-five feet each in width, for the free passage of vessels up and down the river. It is further provided that the defendants shall keep a careful person at the bridge to open the draw for the free passage of vessels, and the defendants are also made liable for both penalty and damages in case this duty shall be neglected or disregarded. *P. L. of 1855 p. 353.* So far the purpose of the legislature is very plain. They meant that the navigation of the river should at all times remain open and free, and that the privileges granted to the defendants should be held in subordination to the right of free navigation.

In 1874, the legislature by a general law declared that whenever it shall be necessary to repair or rebuild any bridge over a navigable stream in this state, the person so repairing or rebuilding shall not be liable for damages occasioned by obstructing or stopping navigation thereby, provided that the repairing or rebuilding be done between certain dates, and the notice prescribed by the statute be given. *Rev. p. 87 § 13.* This act, it will be observed, does not by express words authorize navigation to be obstructed; it simply says that if in a certain contingency navigation be obstructed, the person guilty of creating the obstruction shall not be liable for the legal consequences of his act. It does not authorize the wrong, but merely relieves the person committing it from its ordinary legal consequences.

But suppose it be granted that that has been done by indirection, which in such a matter should be done in the most straightforward manner; suppose we say that this statute, by implication gives authority to obstruct navigation, then the question is presented, when and under what circumstances may this authority be exercised? The statute must be construed in connection with the charter. The charter is not repealed. We have no express indication of an intention to change or alter it in any respect, and it is only because of the repugnancy between the general purpose of the statute and the provision of the charter in favor of the right of navigation, that we are justified in saying that the defendants can under any circumstances obstruct navi-

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gation. Considering both statutes, and regarding them as intended to prescribe regulations with respect to the same subject-matter, I think we are justified in believing that the legislature meant that the authority to obstruct should not be exercised, except the work required to be done was of a nature or character which could not be done properly and with reasonable dispatch, unless the draw was closed. The material words of the statute are, "shall not be liable for damages occasioned by obstructing or stopping navigation *thereby*," or, in other words, shall not be liable for damages which are necessarily occasioned by the repairs or rebuilding. The statute does not, in my opinion, authorize the defendants to close the draw, unless the work necessary to be done in making the repairs cannot be done with the draw open. The court of errors and appeals, in construing this very charter, have, through Mr. Justice Elmer, said: "Without legislative authority no one has a right to obstruct navigation; and where the law authorizes an obstruction without defining the precise nature of it, it must be restrained to what is reasonably necessary to effect the purpose intended." *Newark Plank Road Co. v. Elmer*, 1 Stock. 789.

The defendants attempt to show that the public convenience will suffer less by closing the draw than by leaving it open. The statute gives them no right to compare benefits and contrast injuries, and keep open or close the draw as they may decide public interest and convenience will be best promoted. Power to decide such a question should not be delegated to them. They have a right to collect tolls of those who pass over the bridge, while vessels passing through the draw have a right to pass free. Besides, which means of transportation—the highway across the stream, or the highway up and down the stream—is to be preferred, is a question which can only be decided by the legislature. The statute makes no attempt to delegate this power to the defendants, and if it did, it would most probably prove abortive. No person can be a judge in his own case. *Schroder v. Ehlers*, 2 Vr. 44; *Winans v. Crane*, 7 Vr. 394.

My conclusion is that the statute simply gives the defendants the right to close the draw of their bridge when it is necessary to

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do work which cannot be done properly and with reasonable dispatch with the draw open. It is admitted that the work now necessary to be done can be nearly as well done with the draw open as closed. It must, therefore, be kept open. An injunction will go, enjoining the defendants from obstructing navigation.

FREDERICK BUTTERFIELD

v.

SUSIE J. OKIE AND SUSAN J. PITCHER.

1. The lien of a vendor for unpaid purchase-money is entitled to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or an equitable advantage which does not give such advantage a superior claim to the legal estate.

2. A prior debt is a sufficient consideration to give a mortgage the character of a *bona fide* mortgage for value against a secret equity unsupported by any legal right.

3. A wife may execute a valid mortgage to secure the debt of her husband, but if such mortgage is voluntary, so far as the wife is concerned, it cannot be upheld against her creditors.

4. A vendor's lien for unpaid purchase-money is entitled to prevail against the vendee's donee, whether the donee claims under a deed absolute or a mortgage.

On final hearing on bill and answer, and proofs taken in open court.

Mr. John R. Emery, for complainant.

Mr. Robert E. Chetwood, for defendants.

VAN FLEET, V. C.

This suit is brought to enforce a vendor's lien for unpaid purchase-money. The vendee makes no defence, and as against her, it is entirely clear the complainant is entitled to the relief

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he asks. The only debatable question in the case is, whether the complainant's lien is entitled to prevail against a mortgage made by the vendee subsequent to her purchase. The material facts may be stated in a few words. The mortgagee is the mother of the vendee; the debt for which the mortgage was given was not the debt of the vendee but of her husband; the debt was an antecedent one, having been contracted several years prior to the execution of the mortgage; the mortgagee took her mortgage without notice, either actual or constructive, of the complainant's rights.

The question at issue between the parties must, I think, be determined by contrasting their equities, and if upon such examination it shall be found that the defendant's equities are equal to those of the complainant, the defendant will be entitled to prevail, for she has the advantage of the legal title or right. *Qui prior est tempore, potior est jure.* The rule to be applied in such cases, I think, may be formulated as follows: The lien of a vendor should be preferred to any other subsequent legal equity, unconnected with a legal advantage, or an equitable advantage which does not give it a superior claim to the legal estate, but should be postponed to a subsequent equal equity connected with such advantage. This statement of the rule is taken, almost literally, from the opinion of Chief-Justice Marshall, pronounced in *Bayley v. Greenleaf*, 7 *Wheat.* 47.

Now, it would seem to be entirely clear that if the mortgage in question had been executed to secure the vendee's own pre-existing debt, it would, by force of this rule, be entitled to prevail against the complainant's lien, for this court has more than once held that a prior debt is a sufficient consideration to give a purchaser or mortgagee the character of a *bona fide* purchaser or mortgagee for value against a secret equity, unsupported by the legal right. "Our courts have uniformly held," says Chancellor Zabriskie, "that a prior debt is a sufficient consideration to protect one holding the legal right, against the prior equity of one who has no legal right, when the other has no notice of such equity." *Uhler v. Semple*, 5 *C. E. Gr.* 293. The same view has been expressed in other cases. *Traphagen v. Hand*,

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9 Stew. Eq. 384; Sweeney v. Williams, 9 Stew. Eq. 459. But this mortgage was not given for the debt of the vendee; she was under no duty, either moral or legal, to pay it, or to secure it, and her act in mortgaging her lands to secure it, was one of pure favor or benevolence to her husband. If she had first conveyed the mortgaged premises to her husband, so that he might have secured his debt by a mortgage on lands standing in his own name, her conveyance, as to her own creditors, would, unquestionably, have been fraudulent. As against the lien of the complainant, such an instrument would not have possessed the slightest legal force, and on a bill to enforce his lien, the complainant, in addition to the usual relief given in such cases, would have been entitled to a decree nullifying such deed. *Graves v. Coutant, 4 Stew. Eq. 763*: That another method was adopted in this instance, to reach the same end, does not alter the legal character of the transaction. In such matters the means used are generally unimportant; the court must be governed by results. There can be no doubt that a wife may make a valid mortgage to secure the debt of her husband, and such a mortgage will be upheld, even though it is made simply by way of gift to the husband, and to secure his bond founded on a mere moral consideration, but such an instrument, being purely voluntary so far as the wife is concerned, cannot be upheld against her creditors. *Campbell v. Tompkins, 5 Stew. Eq. 170; S. C. on appeal, 6 Stew. Eq. 362*.

Stated plainly, what the vendee has attempted to do, is this: to give the lands which she purchased of the complainant, and for which she was not paid a penny, to her husband, by mortgaging them to her husband's creditor. The mortgagee, in such a case, stands simply as the donee of the wife, having no higher or greater equity than she had. Between such a mortgagee and the vendor of the lands, there can be no comparison of equities, for the mortgagee is absolutely without any. He stands simply as donee of the lands, and according to the uniform course of judicial opinion on this subject, takes the lands subject to the rights of the vendor.

The complainant is entitled to a decree, declaring that his lien

Frink v. Adams.

is entitled to prevail over the mortgage of the defendant, and that his debt and taxed costs of this suit shall be first paid out of the proceeds of the sale of the lands.

BARTON FRINK

v.

ISRAEL S. ADAMS.

1. A deed absolute on its face may, where such was the intention of the parties, be declared to be a mortgage, but its character must be determined by the mind of the parties at the time of its execution and not at a subsequent date.

2. A grantee for value of a mortgagee under a deed absolute on its face, who acquires title without notice that the deed was a mortgage, will hold the land free from the equities of the mortgagor.

3. The title upon record is a purchaser's protection if he purchases in good faith.

4. The direct and positive answer of a defendant, responsive to the charges of the bill, respecting matters within his own knowledge, in a case where the complainant has required him to answer under oath, must prevail unless overcome by two witnesses, or by evidence equivalent thereto.

On final hearing on bill and answer and proofs taken in open court.

Mr. Thomas E. French and Mr. Abraham Browning, for complainant.

Mr. H. L. Slape and Mr. Peter L. Voorhees, for defendant.

VAN FLEET, V. C.

The principal object of this suit is to procure an adjudication that the defendant holds certain lands as mortgagee, and not as owner. The lands in controversy were originally held by the complainant and one Daniel Baker, as tenants in common, each

Jennings v. Dixey.

ISAAC S. JENNINGS et al.

v.

EDWARD F. DIXEY et al.

In 1842, Shinn, who was seized of an undivided moiety of a tract of land with Price, agreed to sell his moiety to Price for a certain number of cattle, and in pursuance thereof executed a deed to Price and had it recorded, but Price refused to receive the deed when tendered to him, or to deliver the cattle. In 1855, Crammer, who then owned Price's moiety, and Shinn executed mutual releases for the land, and the release given to Crammer was recorded shortly afterwards, but Shinn did not have his release recorded until 1870. In 1869, Crammer's administrator executed a deed to the defendant, reciting that said Crammer became seized of the one-half of said premises by deed from Shinn, dated and recorded &c. The defendant also claimed the land, or some interest in it, through Ridgeway, to whom Price's heirs-at-law had executed a deed.—*Held*, that the recitals in the deed of Crammer's administrator to himself were enough to put the defendant on inquiry, and further, that he was bound by a statement by one of Price's heirs (his son) to Ridgeway, made when their deed was given, that his father never owned, or claimed to own, the property, and that they (Price's heirs) had no claim on it.

Mr. B. Gummere, for complainants.

Mr. P. L. Voorhees, for defendants.

BIRD, V. C.

I think the complainants are entitled to the aid of this court in procuring the cancellation of the deed named in the pleadings, executed by Caleb A. L. Shinn to Liberty Price, and in protecting them against the deed made by the heirs-at-law of Price for the lands mentioned in the pleadings.

It is conceded that Shinn was seized of the equal undivided one-half of lot No. 16. It is proved that about the 1st day of January, 1842, Shinn agreed with said Price to exchange his interest in said lands for cattle valued at \$90; and that in pursuance thereof, Shinn executed a deed of conveyance to Price, had it recorded, and then tendered it to him. Price refused to

Jennings v. Dixey.

accept the deed or to deliver the cattle. Except an action for damages, that was an end of the matter between Shinn and Price. That deed remained uncanceled of record.

The defendants claim that they have title through this deed to Price, by purchase from his heirs-at-law. They insist that they searched the records as to this title, discovered this conveyance and took it for granted that the title was complete. But the defendants also claim title from Shinn through another channel for some interest in this same land. Let us look at that claim of title and see how it affects the former.

Shinn's title only embraced an undivided one-half. On the 2d day of August, 1855, John Crammer was the owner of the other half; and on that day (more than thirteen years after the execution and registry of the deed to Price) Shinn and Crammer executed releases to each other for the undivided one-half, so that they held in severalty. Crammer soon had the deed given to him recorded. Shinn did not get his deed from Crammer recorded until the year 1870. About twelve years after the execution of the deed to Crammer by Shinn, Crammer died, and on the 16th of January, 1869, Crammer's administrator, Isaac P. Peckworth, made a deed of conveyance to the defendant, Edward F. Dixey, in which it is recited—

“That the said John Crammer, deceased, became seized of the one-half part of the said beach lot by deed from Caleb A. L. Shinn, dated the 2d day of August, 1855, and recorded in the clerk's office of Toms River, in book 9 of deeds, page 340” &c.

Hence it is apparent that Shinn dealt with this land as his own in the year 1855. He then conveyed to Crammer. Through Crammer the defendants claim a portion of these same lands; and hence it seems to me that Dixey could not have traced his title through Crammer without coming to a correct understanding of the fact that the deed to Price never took effect. He certainly would have seen that if Price took title under the deed to him, that then Crammer could not take any title from Shinn. But it is urged that this view would be pertinent if the defendants had not been misled by the record of the deed to Price.

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The answer to this is, that there was no occasion for being misled. Had they paid the least respect to the law of diligence they would not have been deceived. They were bound to know that Shinn was claiming this land, or an interest in it, in 1855, and in that year conveyed to Crammer. They were bound to know that Crammer treated this land as Shinn's. They could not but perceive that the *status* in 1855 was wholly different from what it was in 1842. How, then, can it be said that the defendants are *bona fide* purchasers without notice?

But Dixey says he thought he was buying the whole of lot No. 16 from Peckworth. This cannot be so, for the deed under which he took title from Peckworth only conveys to him "the equal undivided one-half part." This applies to the first and second descriptions in this deed, the first of which undoubtedly describes the whole of lot No. 16 (two hundred and ninety-six acres), and the second only the northern half (one hundred and forty-eight acres). It is evident that he only took title to the undivided half of the whole, and to the undivided half of the northern half of the whole. Whatever that may include is not decided, nor is it necessary to decide it. It does not include the fee of the whole two hundred and ninety-six acres.

Certainly Mr. Dixey concluded he did not purchase the whole fee of Crammer's administrator, for he takes a deed from the heirs-at-law of Price. Can this avail him? I think not. If the above recitals were not sufficient notice to put him on inquiry, the positive information given by Samuel Price, one of the children of Liberty, to Mr. Ridgeway, who procured the conveyance from the Price heirs, leaves no doubt on the point of notice. He says that before he signed the deed he told Mr. Ridgeway that his father never owned, nor claimed to own, the property, and that they had no claims on it.

I will advise that the deed to Price be canceled, and that the deed made by the heirs-at-law of Price be declared null and void, with costs.

Conover v. Ruckman.

WILLIAM W. CONOVER

v.

ELISHA RUCKMAN et al.

R. loaned his own money, taking a bond and mortgage as security therefor, in the name of his wife, and having the mortgage recorded without making any other delivery thereof to his wife, which appears to have been one of a number of transactions avowedly done, with the knowledge of the wife, to hinder creditors.—*Held*, that such transaction cannot be upheld as a gift against the creditors of the husband who have liens by judgment or attachment.

Mr. C. Robbins, for complainant.

Mr. J. Weart, for defendant Mrs. Ruckman.

BIRD, V. C.

This suit was instituted by the complainant, a creditor of the defendant, Elisha Ruckman, to obtain the aid of this court in enforcing the lien of an attachment.

On the 1st day of August, 1877, John Doran and wife executed to Margaret Ruckman a mortgage, to secure the payment of \$3,000, then loaned to him by Elisha Ruckman, which mortgage was then delivered to him or to his attorney, was left at the clerk's office to be recorded, was recorded and afterwards passed into the actual possession of Elisha Ruckman. The money so loaned was his.

It is alleged that this mortgage was taken in the name of the wife with the intent of cheating and defrauding the creditors of the husband.

But Mrs. Ruckman claims this mortgage and the money due upon the decree and realized under the execution issued thereon. She has answered separately. She denies the validity of the complainant's claim; denies his right to attach money due on a decree of this court; denies that he has acquired any lien under the attachment; denies that these particular moneys can be at-

Conover v. Ruckman.

tached at the suit of a creditor of the husband, since this court has decreed in another suit that these moneys belong to her; and denies that there was any fraud which this complainant can lay hold of to deprive her of them.

The foundation of the complainant's claim is a note for \$600, given to Robert Allen, Jr., by Elisha Ruckman, dated February 4th, 1880. The attachment was issued May 27th, 1880. Mrs. Ruckman called Mr. Allen as a witness; he said this note was given to him for professional services rendered to Elisha Ruckman, naming several matters in which he was employed, showing no inconsiderable amount of work. I think, as the testimony stands, this note was a binding obligation to the parties thereto. It follows that it can be enforced by any *bona fide* holder against the maker or his estate. The complainant held a note for a large amount against Mr. Allen; he took the Ruckman note in part payment, giving credit for the amount due on it to Mr. Allen by endorsement. I am not aware of any legal principle which declares that such a transaction shall not be upheld.

That a writ of attachment may be lawfully served on an officer holding moneys arising from a sale pursuant to a decree of this court, was settled in the case of *Conover v. Ruckman*, 6 Stew. Eq. 303.

That the requirements of the statute regulating proceedings in attachment were substantially complied with in the service of the writ on the officer and against the funds in question, I think is well established by the testimony. The coroner who served the process says he served it on the sheriff twice; the first time, he thinks, the money referred to in the return had not been paid to him; this was about half-past ten in the morning; the second service was about an hour afterwards; Mr. Neafie assisted him at both services; on the second service the money had been paid to the sheriff and was in his hands; the writ was not returned until after it had been served the second time; he was under the impression that the payment to the sheriff had been made by the check of Mr. Allen; the sheriff told him when he served the writ the second time that he had the money; that he had a check for the money. In these statements he is fully corroborated by

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John Neafie, who assisted in executing the attachment, and also by the sheriff, who held the money sought to be reached.

As to the effect of the decree in the foreclosure suit on these moneys in determining the title, suffice it to say that this complainant was not a party thereto, and cannot be bound.

Can Mrs. Ruckman hold these moneys against the creditors of her husband under this attachment? The facts will shed all the light required to reach a proper conclusion. John Doran, the mortgagor, says that he borrowed the money of Mr. Ruckman; that he had nothing to do with Mrs. Ruckman in the matter; that the first her name appeared was when the mortgage was drawn; she was not present; he paid the interest every six months to Mr. Ruckman, who gave receipts therefor in his own name; Mrs. Ruckman found no fault until about the time this foreclosure suit was commenced; he repeatedly heard Mr. Ruckman say the money was his; in the month of December, 1879, he heard Mrs. Ruckman say (in a suit for divorce) that the money was Mr. Ruckman's; he heard Ruckman speak of placing his property in his wife's name to avoid the Parker and Bergholz judgments; he said he had put it in her hands to keep them from getting hold of it; in that statement he referred to this \$3,000.

In these statements, except as to what Mrs. Ruckman said, Mr. Doran is sustained by his wife. Edmond Stephens was present during the progress of the suit for divorce in New York, and heard Mrs. Ruckman say that this Doran mortgage was in her name, but that the money belonged to her husband. The wife of the last witness so understood Mrs. Ruckman also.

Mrs. Ruckman was sworn in her own behalf. She said the money loaned on the Doran mortgage was her husband's; she said that mortgage was never delivered to her by her husband, nor by Doran; she knew, at the time of the execution of these and other papers, that her husband was involved in litigation, resisting very large claims; and that he had declared that he would never pay them. Some of these claims are unpaid.

I think, where the interests of creditors are at stake, as in this case, it is safe to say that no right, title or interest passed to

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the grantee in such a transaction. According to Mrs. Ruckman's own statement, there was no delivery. Therefore, the title never passed to her. It is true, it was drawn in her name and recorded; but more was necessary to effect a delivery and pass title. *Jones on Mortgages* § 539; *Jacobus v. Mutual Benefit Life Ins. Co.*, 12 C. E. Gr. 604. I think this case, as now made, is wholly unlike the one of *Ruckman v. Ruckman*, 5 Stew. Eq. 259. The testimony of Mrs. Ruckman in her divorce suit, as given by the Stephenses in this, shows she never accepted the mortgage. Then, certainly, the law will not compel her to become the recipient (3 Washb. on Real Prop. 284, 285) in order to prevent a creditor from recovering the amount of his judgment.

But, if there was an effectual delivery, the purpose being to hinder and delay creditors, not simply to make a fair settlement of a portion on the wife, and the wife having knowledge of that purpose and also of the situation of the husband's affairs, I do not understand that the gift can be sustained. I think the law would be most lame and impotent, were such a transaction to be upheld against any creditor, existing at the time or subsequent, showing himself in other respects within the rule. The law in such case must of necessity let in the subsequent creditor, or fix its seal of approbation on open and defiant fraud. Of course, I would distinguish between the honest and dishonest transfer. *Clafin v. Mess*, 3 Stew. Eq. 211; *Conover v. Ruckman*, 6 Stew. Eq. 303.

If I am correct in my conclusions that there was no actual valid gift, or that if there was, then there was such fraud as to affect the donee, the court will be slow to hear her on the technical points above considered, against a creditor who is here with his lien by judgment or attachment.

I will advise a decree in accordance with these views, with costs.

Burhans v. Beam.

JOHN BURHANS

v.

JOHN R. BEAM et al.

While complainant was a minor, a partition sale of lands, in which he owned an undivided one-third, was ordered by the orphans court. At the sale the commissioners, without direction from the court, announced that they would accept seventy per cent. of the purchase-money in first mortgages, and did so, but reported the sale to the court as if it had been for cash only. Several persons (the defendants) agreed that Beam should buy part of the land for them at the sale, which he accordingly did, and he gave several mortgages for the seventy per cent., in his own name, to the commissioners, who assigned part of them to the complainant's guardian on account of his interest in the lands. Beam also executed a declaration of trust, stating that he held the title in trust for himself and the defendants, and they paid their respective portions of the thirty per cent. required at the time of sale, and the interest subsequently accruing on the mortgages. The guardian assigned the mortgages to the complainant when he attained his majority. On foreclosure, the premises did not produce enough to satisfy the mortgages.—*Held*, that the defendants, who authorized Beam to purchase for them, were not personally liable for the deficiency.

On bill to foreclose, and prayer for deficiency.*Mr. E. Stevenson*, for complainant.*Mr. J. W. Griggs*, for defendants.

BIRD, V. C.

This bill was filed by John Burhans to foreclose a mortgage given by John R. Beam to James Van Blarcom, Garret I. Blauvelt and Peter Doremus, commissioners, who had been ordered to sell certain real estate in which the complainant had an undivided one-third interest. This mortgage was given to secure seventy per cent. of the purchase-money. It bears date August 11th, 1873. By an assignment dated November 1st, 1873, acknowledged November 7th, it was transferred to Augusta

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Burhans, the mother and then the guardian of complainant. August 27th, 1878, after the complainant had arrived at age, he accepted an assignment of said mortgage from his mother and former guardian.

Whilst the defendant, John R. Beam, alone executed the bond and mortgage, the bill prays for a decree for deficiency against not him only, but John J. Brown, John H. Hinsdale, Libbie Benner, and Margaret Hoxey, as executrix of Thomas D. Hoxey, deceased. Whether they are liable with said Beam or not, is the only question submitted.

In March, 1872, the complainant and others were seized in fee of six tracts of land located in Passaic county. The orphans court appointed commissioners to divide said lands. Four tracts were divided by the commissioners, and two were laid out in lots and sold. These lots were advertised for sale June 3d, 1873. The commissioners, without any authority from the court, gave notice that they would require thirty per cent. of the purchase-money paid in cash, and that the balance could be secured by the bond of the purchaser and first mortgage on the premises. John H. Hinsdale, one of the defendants, was auctioneer and struck off to himself several of these lots. Others were struck off to Thomas D. Hoxey; others to John R. Beam and others to different buyers.

A question arose at this stage whether Hinsdale was acting for himself or for others, and for that reason, or some other not satisfactorily disclosed, the sale of the balance of the lots was adjourned until July 1st, 1873, when they were all sold. The insistment on the part of the complainant is, and not denied by the defendants, that the defendants bid directly or indirectly at one or both of these sales, and that one or more lots were struck off to them; also, that at some time before the confirmation of the sale, but at what time it is not established, an arrangement was entered into by the defendants that their several bids should all be considered as the bids of John R. Beam. To this the commissioners assented, and reported the sales of these several lots to the court, and the court confirmed the sales as made to him. Afterwards, the commissioners executed and delivered

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deeds to John R. Beam for the several parcels which had been so reported as sold to him. The other defendants contributed their proportion of the thirty per cent. of the purchase-money. Beam gave his bond and mortgage on the premises for the balance of the purchase-money. The bond was payable in five years.

By a declaration bearing date May 11th, 1873, acknowledged and recorded May 18th, 1874, Beam declared that he held these lands in trust to sell for the other defendants. Each of the defendants contributed his proportion of the interest on the bond, as it fell due, so long as any was paid.

The commissioners treated the mortgage in their hands as cash, no mention being made of it in their proceedings in the orphans court.

In November, 1873, after the deed was made and the mortgage accepted by the commissioners, Charles Burhans and Augusta, the guardian, called on Mr. Van Blarcom, as one of the commissioners, to make settlement with him. When Mr. Van Blarcom produced the bond and mortgage and offered them as so much cash, it was at first objected that they were not cash, to which Mr. Van Blarcom replied that they were as good as cash, or words equivalent thereto, and that he had done the business the same as he would have done it for himself. The guardian then accepted the bond and mortgage.

At the time of this transaction no one dreamed of any loss, but since the ward has arrived at age, and the bond fallen due, serious loss is manifest. This being so, the complainant contends that since the defendants all bid, and the lots were severally struck off to them, and they made an arrangement with Beam, one of their number, that they should have an equal interest with him in the proceeds of future sales of these lands to be made by him, that they were thereby equally bound with him for any deficiency, although neither of them signed the conditions of sale.

Not being in any sense bound by the strict rules of law, are they by rules of equity, for any deficiency? The complainant claims that having, by some arrangement with Beam, which is

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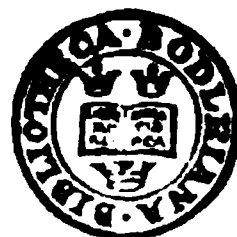
evidenced by the declaration of trust, become interested in the land, they stand in the position of purchasers and are liable as such.

The complainant, as assignee, stands in no better position than the commissioners. He took all their rights, no more. Would the commissioners have prevailed had they come in with this prayer? I think not. I cannot perceive the slightest ground for the charge of counsel that a fraud was committed in the transaction. Nor do I find any proof that there occurred such a mistake as is the foundation of relief in this court.

Consider that the commissioners and mortgagees who consented that a number of these lots should be struck off to defendants, other than Beam, should afterwards wholly release them, not even requiring them to sign the conditions of sale, and formally report the sale to the court and ask for its confirmation in the name of Beam alone, and as formally make the deed to him; and how could it be said that the commissioners could ask anything at the hands of this court, either on the ground of fraud or mistake as against the defendants whom they consented should not be parties to the record in partition or to the mortgage. I think, as the proof stands, the court could, and ought not to allow the commissioners to establish anything outside of the record which they made. If I am right in this, the complainant taking under them is also concluded. *Conover v. Van Mater*, 3 C. E. Gr. 481; *Cornish v. Bryan*, 2 Stock. 146; *Bush v. Cushman*, 12 C. E. Gr. 131.

I think from these cases it may safely be inferred that no new rights arise, nor are any new liabilities created, by an assignment of the bond and mortgage.

Again, great stress was laid on the assertion that these commissioners acting in the capacity of trustees and dealing with these lands as such, they participated in the fraud with the defendants in the scheme which results in so much injury to the complainant. The complete answer to this is that the guardian of the complainant was under no obligations to accept either worthless or depreciated securities from the commissioners. Nor was the ward obliged to accept of any such securities from his guar-



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dian. In each case cash could have been insisted on. The commissioners could not have escaped responding according to the very terms of the record, which, I understand, shows a cash sale.

And again, the complainant urges that on the part of the defendants this was in the nature of a partnership transaction, and that as a consequence all are liable for the acts of either with respect to the partnership property. Giving fullest scope to this general declaration, it is fully met by the reasoning in *Williams v. Gillies*, 75 N. Y. 197: "If the bond was not executed in the name of the firm, nor with the intention that it should be their act, can the vendor claim any rights against the others? I think not. He transferred the bond to Dobbs and received \$5,000 in cash and a mortgage upon the premises, and the individual bond of Dobbs, to secure the balance of the purchase-money. This was the security which he bargained for and received, and intended to accept. So far as he gave credit to any one, it was to Dobbs. It is probable, if not presumable, that he knew all the facts. Raynor was his son-in-law and broker who negotiated the sale. I think the case fairly shows that all the parties, including the vendor, intended the transaction to be precisely what it purports on the face of the papers, and that neither of them intended or supposed that any one was liable upon the bond but Dobbs." To the same effect is *Patterson v. Brewster*, 4 Edw. Ch. 352. Nor does the case of *Brooke v. Washington*, 8 Gratt. 248, carry the doctrine any further.

It seems to me that with this last consideration the claim for subrogation is disposed of. There should be a decree for deficiency against John R. Beam only. As to the other defendants the bill should be dismissed, with costs. I will so advise.

Grant v. Grant.

JAMES A. GRANT

v.

ANNIE M. GRANT.

1. A petitioner asking for divorce, on the ground of desertion, will not be entitled to a decree if it appears that at any time during the continuance of the statutory period he consents to the desertion.

2. If the separation was caused by the cruelty of the husband, inflicted not in the exercise of any marital right, such cruelty is a continuing bar.

3. If it appears in such case that during the separation his affections have been given to another, this is also a bar.

In this case, the petition is filed by the husband for divorce.

Mr. C. A. Skillman, for petitioner.

Mr. C. Winfield, for defendant.

BIRD, V. C.

The parties were married August 30th, 1870. The husband alleges desertion on the part of the wife; the wife answers, and charges the husband with cruelty towards her and with adultery. The husband insists that the desertion complained of began in 1875. The wife admits that there was a separation then, but urges that it was agreed upon between her and her husband. It is conceded that articles of separation were prepared by the husband, and by him offered to the wife with a request that she should sign them, which she refused to do. But, says the husband, notwithstanding a separation followed, which he consented to at the time, he withdrew his consent and so informed his wife by letter. In this letter he says:

"DEAR WIFE:

"I would love to see you and talk with you, for I have done wrong toward you a great many times. I cannot explain why I did do it, but suffice to say I did do it, but if well-doing in the future can atone for my past misconduct,

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I will be heartily glad to have an opportunity to do it. Oh, how many times since you and I met have I regretted my harshness towards you. God alone only can tell. Dear Annie, do not think this is all chaff and nonsense, and no sooner said than broken, for, believe me, I have often pictured you in my mind's eye as a dear devoted wife, if I had encouraged you and done my duty towards you. Annie, my unjust censures of you have been atoned for, if my heart is an indication of right and wrong, for it has nothing but the kindest feeling for you. I do really love you with an undivided heart. I am aware I have committed indiscretions, but I hope they are forgiven if not forgotten."

He also expresses a desire in this letter that they "shall resume their old relations as husband and wife."

The defendant relies on these expressions in this letter, in corroboration of her own evidence respecting her husband's cruelty. She swears that he punched her, struck her, choked her, dragged her across the room in violence, pursued her with a butcher knife, attempted to smother her with a pillow, threatened that he would make it hot for her, and that she caught him in the act of adultery. The striking, choking, dragging, threatening and the adultery he denies; the knife and pillow scenes he says were in fun. I think the expressions used in the foregoing letter are evidence of very great "misconduct" and "harshness." So far as is necessary, this letter very emphatically sustains the allegations of the defendant. It would be quite difficult to conceive of more convincing testimony. It was contended on the argument that the husband purposely discolored or distorted the case against himself, believing that by so doing the wife would the more easily become reconciled. It is incredible that such accusations should originate in trifles. Such language is the expression of a bitter experience. Such self-inculpations arise from a conviction of guilt. It certainly was not necessary for the wife to offer other proof in her own behalf.

But it is claimed that the husband repented. I will not discuss the obligations of the wife to the husband who confesses his cruelty, and seeks reconciliation. Whether it is her duty to try again, I will not decide. Suffice it to say that the statute makes cruelty a ground of divorce. When are confession and an expression of sorrow sure grounds of restoration to confidence and

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to conjugal rights? If so, transgression never need fear punishment, and the injured will appeal to the law in vain.

But, supposing cruelty can be atoned for, I do not think the husband has done all that is required of him. It was not enough for him to write such a letter. It was not enough for him to express a willingness to close the breach between them once more, and then, because his offer was not entertained, withdraw all negotiations and thenceforward to treat his wife as hostile. It was his duty at all times to be ready to receive her. It was his plain duty on every reasonable occasion to strive to regain her affections. Being in the wrong, the law demands more of him than a single sigh of regret or invitation to his home. And the means of communication, too, under the circumstances; what were they? They must be noticed. A letter is addressed to the abused and rejected wife. This method awakens suspicions because of subsequent events. If his feelings were as deep and genuine as his expressions were pathetic, I cannot but think he would have made his overtures face to face, that love might challenge love and drive away distrust.

Again, he could not make his formal offer, and because she refused to comply, place himself in an attitude of antagonism to her, and yet, at the expiration of three years, claim the benefit of her rejection. He admits that he assumed this position. He said that after writing the letter he had as many as twenty-five interviews with his wife. I think, from the testimony, they spent a large portion of the time in Lambertville, having a population of about four thousand, where they were near to each other all the time. He was asked what she said in any of their interviews about coming back, to which he answered:

"After I wrote that letter to her she wrote me such a letter that I did not care anything about her coming back."

The letter thus complained of is here given.

"JIM: I have received your note saying you would like to see me. It is useless to see you, as it would be unpleasant for us both and do no good, as you

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promised the same before and only taunted me with my foolishness in believing you. You say you might have made me a devoted and loving wife; but that time is passed. I have received too much harshness at your hands. It makes my heart ache to see Marian grow up without a mother's care. It would not be so if I could help it. She has a better home than I could give her, as I have to struggle to earn my own living. I shall come to see her as often as I can. I need not ask you to be good to her; I know you are. Jim, I cannot see you, as I think it is best so. Do not think of me as your wife, only as Marian's mother. When the time comes for you to get a divorce, as you will, I suppose, I beg you will not forget I am still Marian's mother. Do not teach her to forget me and call me a bad woman. Please do not write again.

ANNIE."

There seemed to be enough in this letter to chill all his ardent affection for the writer and he says he "didn't care anything about her coming back." As I understand the law, in this he was not justified. He thereby assumes the attitude which he complains the defendant occupies. He not only does that, but boldly declares his assent to the separation. Can the prayer of him who comes into court saying, "my wife and I separated and I afterwards asked her to live with me, but she refused, and then I didn't care to have her live with me," be received with favor? I think not. Divorce for desertion rests on no such ground. Divorces, it may be, are often granted where it only appears that the defendant willfully and obstinately continues the desertion during the statutory period; but never where the petitioner becomes satisfied with that willful obstinacy, and so declares himself in the face of the court. My judgment is that such a petitioner is not within the statute. 1 Bish. M. & D. ¶ 777; *Taylor v. Taylor*, 1 Stew. Eq. 207; *Meldowney v. Meldowney*, 12 C. E. Gr., 328; 2 Bish. M. & D. ¶¶ 5, 6.

The law justly requires much of an offending husband. Had Mr. Grant been as thoroughly in earnest as his words implied, and so continued as he was obliged to, it is more than probable that this litigation would have been avoided; for Mrs. Grant says that she afterwards thought of living with her husband again. In this case, then, the wisdom of the law is both exemplified and justified.

But, if the petitioner had not expressed himself as satisfied

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with the separation, his conduct has been such towards another married woman as to render it quite impossible for a court of equity to grant his prayer. This married woman, Mrs. Hany, is living in a state of separation from her husband. For her, the petitioner has bought furniture and clothing, He has paid for her schooling. He presented her with an organ and sewing machine. He paid for instructions given her in music. He rode out with her in a carriage frequently, and at times to distant places, returning in the evening. In addition to this, he admits that he advances to her \$10 or \$12 in cash per month. He says he has known her about four years, but declines to fix with any certainty when their intimacy began. It must be perceived that this accounts for his saying of his wife, "I did not care anything about her coming back." He had no affection for her; he had given his heart to another. Under such circumstances, I think the petitioner is not entitled to a decree. I will advise that his petition be dismissed, with costs.

ACHSAH LARISON et al.

v.

SARAH POLHEMUS et al.

1. In case a father enters into a parol agreement with two of his sons that if they will take charge of his farms and earn for him a given sum, he will then give up the farms to them; and they take charge and earn the sum named, and thereafter, until the father's death, by his consent, retain all the issues and profits, the taxes on the farms being assessed to him in their presence, no foundation is laid for a decree in favor of the said sons against the other heirs-at-law of the father to convey said farms.

2. In such case, the alleged agreement being with both respecting the same subject-matter, the result of which they were mutually and equally interested in, they cannot testify in behalf of each other as to transactions with or statements by the intestate.

On bill and cross-bill.

Larison v. Polhemus.

Mr. W. H. Vredenburg and Mr. B. Gummere, for complainants.

Mr. G. C. Beekman and Mr. James Wilson, for defendants John and George W. Polhemus.

BIRD, V. C.

Tobias Polhemus died in 1879, intestate. His widow survived him, so did his children, Achsah Larison, Maria Hendrickson, George W. and John; also Emma Terhune and Nettie Havens, children of his daughter, Mary Forsyth; and Ellen Nelson, Tobias Polhemus and William H. Polhemus, children of his son Henry. In this case the bill was filed for the partition of several tracts of land of which the father died seized. To this bill two of the sons, George W. and John, have filed an answer, denying the right of the complainant or any of the other defendants to any interest in two large tracts of the land named in the bill, one containing one hundred and fifty-nine acres and the other one hundred and eighty-eight acres, and claiming title thereto in themselves. Afterwards a cross-bill was filed in support of the answer.

The allegation is that, once in 1865 and once within two years thereafter, their father and they, George W. and John, agreed that they should work and manage said two tracts of land, and that when their earnings amounted to \$12,000 then John should have the farm known as the "Croft farm," on which the father and both sons then lived, and George should have the Hendrickson farm, which in 1865 the father did not own; the plain meaning of which was, supposing there was such an agreement, that the sons were to work for their father until they had earned for him the sum of \$12,000, and then they were to have the farms.

The alleged agreement was by parol, but the insistment is that there was such part performance as to take the case out of the statute. The complainants in the original bill deny that there ever was any such agreement, and contend that, if there was one, it was illegal.

Has any agreement been established? The language employed in the answer to express the agreement is:

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"That heretofore, and about the year 1865, the said intestate entered into a certain agreement with the said defendants, his sons, whereby they respectively agreed that as soon as their earnings amounted to \$12,000, and that sum was invested at interest in the name of the intestate, so that said intestate and his wife would have enough to live on, that he, the said intestate, would, in consideration thereof and of their earnings heretofore by them made and from time to time applied to his use, convey to them by good and sufficient deeds in fee simple, the said Croft farm to this defendant, John Polhemus, and the said Hendrickson farm to this defendant, George W. Polhemus."

To establish this allegation the defendants have both been sworn. It is conceded that no person except the father and sons had any knowledge of the agreement, unless it may be such as shall be gathered or inferred from fragments of conversations or remarks of the father made several years afterwards. So far as the evidence of the sons related to any transactions with or statements by their father, it is objected to. The provisions of the act of 1880 were invoked to sustain this objection. I think the objection should prevail. See *Smith v. Burnet*, 7 *Stew. Eq.* 219, and the same case on appeal, 8 *Stew. Eq.* 314, in which the opinion of the chancellor is unanimously affirmed. *Besson v. Cox*, 8 *Stew. Eq.* 87.

It is, however, insisted that John can speak in George's interest and George in John's, notwithstanding the transactions and statements in which they were both interested occurred at the same time. In my judgment the spirit which prompted the proviso in the act includes this offer, and that the testimony cannot be considered. It was only one contract; the father on one side and the sons on the other. When, in 1865, the agreement was made, the father only owned the Croft farm. Surely they could not speak for each other then. The title to the Hendrickson farm was acquired by the father about two years later; and no other change in the agreement is intimated than that George was to have that farm and John the Croft farm. It is still the same agreement between the father and his sons. If this insistment should prove tenable, the statute would always be unavailing in case there should be two or more parties to one side of an agreement, who should survive and their interests thereunder were divisible. But most manifestly all the temptations to perjury

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would remain. The witness cannot affirm the contract as to the other parties without affirming it as to himself. I fear that such a construction would open the way for combinations and conspiracies against the estates of decedents quite too difficult for the most vigilant to unravel or expose.

The evidence of John and George being rejected, what proof is there of the agreement? David M. Newman says that during an interview with Tobias in the year 1878, he said "he had given up everything to the boys." This, of course, is very comprehensive and would include his other lands, and his personal estate as well. John Niveson says that he called on Tobias in 1878, and found him in the garden with John, and heard him say to John, "You have planted this truck to suit yourself; you have got to attend to it to suit yourself; I don't calculate to do anything in the garden at all this season; I have given all up to you, now go ahead and do as you please." Patrick McGown says that in 1872 Tobias said to him with reference to the Hendrickson farm, "that he had that property fixed up pretty nice now, and that he expected that George was going to get married; he was going to let him have it." Robert Niveson says that he heard the intestate in 1878 say to John "that he had given up everything to him, and he could do as he pleased." In 1876, James Powell heard him say "he was going to give up everything to John; he said he had enough for him and the old lady to live on; that farm there John was to have—he had always stayed home and worked hard." Daniel B. Norton heard him say that "he had a farm apiece for each of his boys." He told Robert Kirby that he wanted a farm for of each his boys.

I think the testimony most relied upon in behalf of the sons was that of George Beatty. He says in the year 1878 the intestate asked him to take a ride with him, which he did, and that while on the way the old gentleman said, "he wanted to fix his business up; he said he had contracted with his boys that if they would make him \$12,000 he would give up the farms to them; he said they had fulfilled their contract and he wanted to fulfill his; he said he had the papers in his pocket by which he wanted the matter fixed." The witness says that the intestate

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was going to Robert Miller's then to get the matter fixed, but that Miller was not at home. Afterwards he adds "he was going to have them fixed for the boys to have the farms, somewhere near that." This witness admitted that he had told a different story about this interview when under oath on another occasion, which seems to render it quite impossible to rely implicitly on his statements.

The sons having worked on the Croft farm from 1865, and on the other from 1867 to the year 1878, and having given all the net proceeds to their father after making all such improvements as they chose, it is now contended that the evidence above recited brings the case within the rule laid down in *Johnson v. Hubbell*, 2 Stock. 332, and in *Davison v. Davison*, 2 Beas. 246, and in *Van Dyne v. Vreeland*, 3 Stock. 370; S. C., 1 Beas. 142. I think there was a very much greater degree of certainty in the alleged agreement in each one of those cases. In this it is quite impossible to determine what was meant by the phrase, "The boys are to have the farms," or other similar ones. In those there was such distinct part performance of a definite contract, or such an emphatic recognition of one on one side and such part performance on the other, as not to leave any alternative to the court. In this, taking the legitimate and reliable testimony to guide, what part performance has there been, or what recognition of a contract which the court could base a decree for specific performance upon? In *Davison v. Davison*, the parol contract was clearly established. The principal feature of it had been expressed by the party sought to be charged in his last will, and its purpose declared by him. In this, the only admissible evidence of any agreement ever having been made is that of George Beatty, who says that the intestate told him that he had contracted with the boys that if they would make him \$12,000 he would give up the farms to them, and that they had fulfilled their contract and he wanted to fulfill his; which is greatly qualified by the fact that when speaking of this same interview many months before, and in point of time much nearer the event, his language was: "He told me he had given up to John and George everything, both the stock and places," in which not

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a word appears respecting a contract. I certainly cannot escape the conviction that if a communication had been made by the old man, containing the expressions which Beatty claims in the former were made to him, he would first of all remembered them when called upon. They would not have lingered to the spur of an afterthought. Without Beatty's story there is no evidence whatever in the case of any contract between the father and his sons about the farms or any other subject-matter. Courts do not rest their judgments and decrees upon such testimony. In the case of *Van Dyne v. Vreeland* the parol agreement set forth was so completely proved as to baffle all doubt. The part performance, too, year by year, was established to the letter and spirit of the contract.

I am not satisfied that the proof in this case thus far considered brings it within any of the adjudications presented to me.

However, the defendants John and George do not rest at this stage. They insist that a true understanding of their father's expressions, such as "give up to the boys," or "I have given up," can only be arrived at by considering the many years of patient toil and care bestowed by the sons on the lands of the father. John resided with his father and worked at least twelve years on the Croft farm, surrendering everything to his father beyond repairs and some valuable improvements. In 1867 the Hendrickson farm was purchased. George remained at home until 1872, assisting John on the Croft farm until the purchase of the Hendrickson farm, and then taking control of that. Having married in 1872, he has resided on the Hendrickson farm with his family until the present time. That this work was done, is not convincing evidence of an agreement to convey the farms.

Moreover, what was said and done by the father and sons leads me to conclude that there never was a contract to convey, and that the court, in refusing the prayer of the cross-bill, does no injustice whatever to the complainants therein. If, as the court believes, they proceeded on an imperfect understanding, it cannot be expected that this court will supply or bridge over the deficiencies. And yet, while I believe there was no contract to

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convey, I think there was one to the effect that if the sons would earn from the management of those farms a certain amount of money for the father, he would then give up the farms to them; he would give up to them the rents, profits and income. This he did; at least the sons so swear. And this is very strictly in harmony with the father's declarations, when he said he "had given up everything to John," and that he was "going to let George have the Hendrickson farm," and the like. So far, therefore, as the evidence establishes anything, it is that the father, in the sense above indicated, gave up the farms to the sons about a year before his death. During that last year there is no evidence that they paid to him any of the rents, or that they accounted for any of the profits, except some money for taxes. And this view of the situation the sons accepted. There is not a particle of proof to show when the father said to John in the garden in the presence of witnesses, "Now, I have given up all to you, you can do as you please," that John objected to that manner of giving up, and demanded a deed for the farm. Nor is there any proof that during that last year either of the sons demanded anything more of their father by way of confirming their claims than what was signified in his "giving up" to them the rents and profits. After he had thus "given up," the sons allowed the farms to be assessed to their father, a very convincing circumstance against their present contention. At the same time they were each assessed for their personal property, valued at \$1,000. In allowing the farm to be assessed to their father, because he still held the legal title, it afforded to them a most favorable opportunity to insist upon a transfer of the title, if the father had ever promised to do so.

Besides all this, it looks as though the sons well understood, also, that they were to take their chances for compensation for their labor out of the profits of the farm, after they had earned the amount specified. Their father was aged, and a long time before his death, very sick and feeble, yet there is no proof that they ever demanded a deed for the farms, or ever insisted upon any other recognition of their claims than a surrender to them of the rents and profits. In addition to this, after

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the death of the father, John said in the hearing of the witness S. S. Nelson, that if his father had made a will he was going to leave him the Croft farm, but as there was no will he supposed he would have to come in equal with the rest. In this, Nelson is supported by Henry Larison and P. K. Forsyth. Up to this time I believe there was no claim made that his father had agreed to convey the farm. I understood Charles Nelson as saying that he heard George make a similar remark to the one above made by John, adding, "Yes, it was the intention for us to have the farms had he made a will." Such statements seem to be wholly inconsistent with the allegations in the answer and cross-bill, that their father had agreed to convey the farms to them.

I think that the prayer of the cross-bill that the defendants therein be decreed to convey all their interest in the Croft farm to John and in the Hendrickson farm to George, should be denied, and will advise accordingly.

The senior counsel of John and George, at the close of his argument, for the first time, urged the court to give to them compensation for their labor in case of judgment against them on the other question. The complainants in the cross-bill were given the opening and reply, and consequently the other side had no notice of such asking until the close of the case; both counsel having addressed the court, and one of them at the time referred to being absent, they did not speak to this point; nor, indeed, had they any opportunity to. This of itself forbids all inquiry, except so far as to observe the embarrassments of John and George, should their cross-bill be dismissed, and it were afterwards to appear that they have a just and equitable claim, and also the apparent insufficiency of the testimony now before the court to found a decree upon. Therefore, with a view of finally settling this branch of the case also, the counsel for the complainants in the cross-bill are at liberty to open the matter to the court at an early day, that steps may be taken to give counsel for the defendants therein an opportunity of being heard. In the meantime, there is no necessity to stay proceedings on the original bill.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF

THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1888.

THEODORE RUNYON, ESQ., ORDINARY.

JOHN REYNOLDS et al., appellants,

v.

JOHN JACKSON, respondent.

The excessiveness of commissions allowed to executors on an intermediate account cannot be examined by exceptions to one of their subsequent accounts. The only remedy is by an appeal from the former decree. If the commissions already allowed to executors have been excessive, that fact may be taken into consideration by the court in fixing the amount of their commissions for subsequent services to the estate.

Appeal from order of Passaic orphans court.

Reynolds v. Jackson.

Mr. J. S. Barkalow, for appellants.

Mr. J. D. Bedle, for respondent.

THE ORDINARY.

David Burnett, John Reynolds and Samuel Smith, as surviving executors of James Jackson, deceased, settled the account of themselves and William Gledhill, deceased, their late co-executor, in 1871. They appear to have turned over the balance of the estate in their hands to themselves as trustees, and in 1875 filed an intermediate account as such trustees. That account was settled and commissions allowed thereon. In 1877, Reynolds and Smith, with George B. Day (Burnett appears not to have acted as trustee after the settlement of the account in 1875), settled their intermediate account as such trustees, and commissions were allowed to them thereon. In 1879, the same persons last mentioned filed another intermediate account, which was settled and commissions allowed to them thereon. They appear to have filed another like account in 1881, and exceptions were filed thereto, on the ground that the amounts of commissions allowed on the settlement of the previous intermediate accounts were excessive and not warranted by law. The object of the exceptions was to surcharge the account of 1881 with such excess. The orphans court, after hearing argument, ordered that the allowances of commissions to the trustees in the former intermediate accounts be set aside, and that it be referred to a master in chancery named in the order, to report the allowance to be paid to the trustees according to law. From this order the trustees appealed. The order is erroneous. The allowance of commissions on the settlement of the intermediate accounts was by the decree of the orphans court. If there was error in those decrees the remedy was by appeal. The orphans court cannot review them on exceptions to the account now before it. The trustees were not bound to charge themselves in their account with the money received by them by virtue of the decree of the court awarding it to them as their commissions. If the account is surcharged with any money on account of the commissions heretofore

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allowed, it must be because of the error of the court in fixing the amount of those commissions, not because of any failure or omission on the part of the trustees to charge themselves with the money; for the decree of the court on the settlement of those accounts is their sufficient warrant for retaining that money and applying it to their own use. If the court is of opinion that those allowances were greater than the law warranted, the question still remains whether, in view of the fact that there was no appeal from the decrees by which they were made, the exceptants are not without remedy. It is to be remembered that the decrees awarded to the trustees certain moneys for their compensation, which they have, on the strength of the decrees, taken out of the estate and applied to their own use, and the object of the exceptions is to compel them to repay it or some part of it, or, in other words, to recover it from them. There is neither fraud nor mistake on the part of the trustees in the matter. A decree of the court on the passing of an intermediate account is as conclusive on the subject of commissions, as a decree on a final account. To hold that such a decree on an intermediate account is liable to review on exceptions to any other intermediate account of the same accountants in the trust, or even on their final account, is to give to such decrees an instability foreign to our ideas of the character of judicial decrees. In the case in hand the orphans court has stricken out of these accounts all the allowances for commissions, although one of the recipients of those commissions is no longer a trustee, and it has entered on the inquiry as to what the commissions ought to have been; thus in effect opening all the decrees by an indirect proceeding, and seeking to compel the present trustees to pay into the estate part of the moneys which, by the decrees of the court, were awarded to the trustees, including Burnett, by the court's own judgment. Though the orphans court may open a decree for fraud or mistake, where either is proved, it must do so by a direct proceeding, having reference to the decree in question. Here there is neither fraud nor such mistake as to justify such action. It is of far more importance that the decrees of the court shall maintain their character of stability, than that a mistake of the court

Mahnken's Case.

in transcending the limits of the statute in awarding commissions by a decree never appealed from, should be corrected ; especially where, as in this case, the application is made by negligent parties, and after the decrees have stood for years. The distinction suggested between such decrees on intermediate accounts and like decrees on final accounts cannot be maintained. If the court has, on an intermediate account, made an excessive allowance of commissions, that fact will have its weight in its allowance of commissions for further services in the trust. The order appealed from will be reversed, with costs.

In the matter of the application of HENRIETTA MAHNKEN and others for payment of money to a foreign guardian.

A testator gave to his wife the income from certain property during her life, with remainder to their children. At the time of her death, there were due to her from his executors about \$3,400 on account of accrued income. The minor children, who are the sole legatees under their mother's will, and under it entitled to all her property, and are non-residents with a guardian duly appointed at their domicil, applied for authority for their guardian to receive the money and remove it to the place of their domicil, under the act authorizing the payment of funds here to the guardian of non-resident infants. The executors resisted the application, on the ground that the money can only be recovered by the legal representative of the mother's estate here, and that they cannot be required to pay to any one else. The objection was sustained and the order refused.

On petition, master's report and depositions and other evidence.

Mr. J. F. Randolph, for petitioners.

Messrs. Talcott & Meyer, for executors of J. L. Mahnken, deceased.

THE ORDINARY.

The petitioners are the four minor children of John L. Mahnken and Catharina, his wife. Both parents are dead.

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The children live in Germany, and they have a guardian duly appointed there. This application is made to obtain authority for him to receive the money which it is claimed by him and them is due from the executors of their father here to them for rents and income received by the executors from property, the rents and income of which were given to their mother for life by their father's will. Their mother, by her will (it has not been proved here, nor has any grant of administration been made here on her estate), gave them all her property. Their father died in 1877 and their mother in 1878. It appears by the report of the master to whom the matter was referred on the petition, that the executors have in their hands, of income and rents received after the father's death and up to that of the mother, \$3,394.81, which belonged to the latter at the time of her decease, and also of the income and rents from the property accrued and received by them since the mother's death (the property was given by the will to the children on her death or remarriage), and up to January 1st, 1880, the further sum of \$3,979.49. But the children are entitled to the whole of their father's personal and real estate, and by the executors' account of 1880, the balance in their hands was \$43,512.72. This proceeding, however, is only in reference to the money—a debt—due to the mother. The act under which these proceedings are taken, provides that in case any guardian and his ward are both residents of another state, or of a foreign country, and the ward is entitled to any property, real or personal, in which shall be included property or money in the hands of any resident guardian, any legacy or distributive share in the hands of any executor or administrator in this state &c., it shall be lawful for the ordinary, or the orphans court of the proper county, to make an order that the foreign guardian may receive the rents, issues and profits of the real estate, and demand, sue for, collect and receive such legacy, distributive share, moneys or other personal property and remove it or them to the place of the residence of himself and ward, and that the delivery, transfer or payment of such property or money to such guardian after the making of the order, shall be a legal discharge and acquittance therefor. *Rev. p. 466.*

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§ 6. By the act of 1878, the same power which is given to the ordinary and orphans court by the above-quoted act is given to the chancellor in the like circumstances, with reference to funds or property belonging to a ward and deposited in the court of chancery or under the control and direction of the chancellor. *P. L. of 1878 pp. 326, 327.* It is evident that the act above quoted, under which these proceedings are taken, does not contemplate a litigation under the application to establish the amount due to the ward. In proceedings under that act, notice is, indeed, to be given to the resident guardian or executor or administrator in whose custody the property may be, of the application for the removal of the property. But it is not incumbent on the court to settle under such proceedings and notice the question whether a debt is due or not, except so far as may be necessary to satisfy it that there is property to be removed, and what it is and the amount of it; that is, so far as may be necessary to enable the court to adjudicate upon the matters which are submitted to it in the proceedings—the sufficiency of security, and whether it is for the interest of the ward that the removal should take place, and whether the removal will conflict with any terms or limitations attending the right by which the ward owns or is entitled to the property, and whether the interest of any citizen of this state in the property may be prejudiced by the removal. In this case, however, the executors do not deny, but on the contrary admit, that the amount which is found by the master to have been due to Mrs. Mahnken at her death, from them, is due, but they do not admit the right of the wards to recover the money by suit against them. They insist that it can only be recovered by a legal representative of the mother. On the other hand, the counsel of the petitioners insists that the children are such legal representatives by the law of Germany (the civil law), which is the law of their domicil, which was the domicil of their mother, and under which law her will was made. Under the act, this court cannot authorize the guardian to maintain a suit which neither the wards nor any guardian of theirs appointed under the laws of this state could maintain. The money due from the executors to the mother at her death can only be recov-

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ered by a duly-empowered representative of her estate, and the children, as her legatees, obviously are not such representatives. No one claiming to be a representative, whether *a testato* or *ab intestato*, can meddle with any portion of the succession before proving the will or receiving a grant of administration or some other formal induction into the property in the forum where such portion is found. *Westlake on Int. Law*, art. 291. See, also, *Whart. Confl. L.* § 604; *2 Redf. on Wills* 18; *Banta v. Moore*, *2 McCart.* 97.

The application will be denied and the petition dismissed, with costs.

GEORGE C. VAN DYKE, appellant,

v.

HENRY J. VAN DYKE, respondent.

In 1843, Dr. Frederick A. Van Dyke, a resident of Pennsylvania, proved the will of his brother, James C. Van Dyke, a resident of Somerset county in this state, in Somerset county. He filed an inventory here, but no account. In 1867, he died in Pennsylvania, and his will was duly proved there by his three sons, one of whom did not act and was afterwards discharged, leaving Frederick A. and Henry J. the acting executors. In 1870, Frederick A. Van Dyke took out letters of administration on Dr. Frederick A. Van Dyke's estate in Middlesex county, and also letters on the remaining estate of James C. Van Dyke. An exemplified copy of Dr. Frederick A. Van Dyke's will was filed in the Middlesex surrogate's office. Frederick A. Van Dyke is now dead. One claiming to be a beneficiary under a trust under the will of James C. Van Dyke, applied to the orphans court of Somerset county to require Henry J. Van Dyke, who is a non-resident, to settle the account of Dr. Frederick A. Van Dyke as executor of James C. Van Dyke.—*Held*, that that court had no jurisdiction to require him to account, and that notwithstanding the beneficiary's efforts to obtain such an accounting in the Pennsylvania courts have been futile.

On appeal from sentence of the orphans court of Somerset county.

Van Dyke v. Van Dyke.

Messrs. Woodbridge Strong & Sons, for appellant.

THE ORDINARY.

This is an appeal from a final sentence of the orphans court of Somerset county, denying an application for an account. The appellant is George C. Van Dyke, and the respondent the executor of Dr. Frederick A. Van Dyke, deceased, who was one of the three executors named in the will of James C. Van Dyke, deceased, and the only one who proved the will. The applicant claims to be interested in the estate of James C. Van Dyke as a beneficiary under a trust created by his will. James C. Van Dyke was a resident of this state. He died here in 1843, leaving a will duly executed, dated October 19th, 1829, and republished July 21st, 1832. By it he appointed his brother, Dr. Frederick A. Van Dyke, John Terhune and Littleton Kirkpatrick, executors. It was admitted to probate in Somerset county, November 7th, 1843, and letters testamentary thereon issued to Dr. Frederick A. Van Dyke, who alone proved it. Mr. Kirkpatrick is dead, but Mr. Terhune is still living at a very advanced age. Dr. Van Dyke, who lived in Philadelphia, filed in the office of the surrogate of Somerset county an inventory of the personal estate, but never filed any account. He died in Philadelphia November 17th, 1867, leaving a will, which was duly proved there in the same month by his executors, his sons Frederick A., Henry J. and Rush. The last-named executor did not act, and was subsequently discharged. Frederick A. Van Dyke took out letters of administration of his father's, Dr. Frederick A. Van Dyke's, estate in Middlesex county November 21st, 1870, and afterwards, on the 7th of July following, took out letters of administration *de bonis non cum testamento annexo* of James C. Van Dyke, deceased. An exemplified copy of Dr. Frederick A. Van Dyke's will was filed in the office of the surrogate of Middlesex county. Frederick A. Van Dyke (the 2d) is now dead. The will of James C. Van Dyke contained a provision which, it is alleged, created a trust in one-fourth of his estate in the hands of Dr. Frederick A. Van Dyke, for the benefit of the appellant and his brothers and sisters, and by virtue

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thereof the appellant claims to be interested in the estate of James C. Van Dyke, and therefore entitled to an account of the estate. He filed a petition in the orphans court of Somerset county, praying that Frederick A. Van Dyke, as administrator *de bonis non cum testamento annexo* of James C. Van Dyke, might be required to account, and that he and Henry J. Van Dyke, as executors of their father, might be compelled to settle their father's account as executor of James C. Van Dyke. The orphans court held that it had no jurisdiction to require the administrator *de bonis non* to account, but that decision was put on the ground that his letters were issued in Middlesex county, which was an error, as they were issued in Somerset. He, however, is now dead. It held also that it had jurisdiction to require the executors of Dr. Frederick A. Van Dyke to settle his account of the estate of his testator, but that the petitioner had not shown himself to be entitled to require such account. The petition was therefore dismissed, with costs.

No letters testamentary on the will of Dr. Frederick A. Van Dyke have been granted in this state. The exemplification above mentioned was merely filed and recorded, and no letters testamentary were issued or applied for thereon. The proceedings in that matter seem to have been taken not under the twenty-third and twenty-fourth sections of the orphans court act, but under the twenty-sixth. Both of the executors reside out of this state. The succession to Dr. Van Dyke's personal property here is not in his surviving executor, but in the administrator of his estate appointed here. The orphans court has no jurisdiction over the foreign executor. It appears to have assumed it mainly, if not entirely, on the ground that unless it did so the appellant would be without remedy. The reason is not sufficient, if it were well founded. The cases cited by the appellant's counsel in support of the jurisdiction do not sustain it. They are cases where jurisdiction has been asserted over a foreign administrator or executor having funds of the estate in his hands, and himself being in the state in which the proceedings against him were taken. The efforts of the appellant to obtain relief in the courts of Pennsylvania have indeed proved fruitless. He is a resident

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of that state. He filed exceptions there to the account of the executors of Dr. Frederick A. Van Dyke, which were overruled, it being held that the orphans court there had no jurisdiction over the account of James C. Van Dyke's executor, but that the jurisdiction was in this state. He then took out letters of administration *de bonis non cum testamento annexo* of James C. Van Dyke, deceased, in Pennsylvania, and as such administrator attempted to call the executors to account there. He failed in that effort also, it being held that the orphans court there would have no jurisdiction until the estate of James C. Van Dyke should have been settled here, and the liability to account for the trust fund established; that is, that it was a jurisdictional prerequisite to proceeding in the orphans court against the executors that it should be established that there was a fund for which they should account. The fact that those efforts have proved unavailing obviously would not confer jurisdiction here over the executors, over whom otherwise the orphans court here would have no jurisdiction. Nor (it is equally obvious) would the fact, if it were so, that the appellant would be wholly remediless in the premises, unless he could obtain relief in the orphans court here, of itself confer jurisdiction.

The decree of the court below will be affirmed, but without costs.

ALFRED S. CLAYPOOL et al., appellants,

v.

JOSEPH NORCROSS, respondent.

An oral announcement of an intention to appeal from a decree of the orphans court, or even an oral demand of an appeal, is insufficient. The demand must be in writing.

Appeal from decree of Burlington orphans court. Motion to dismiss appeal.

Claypool v. Norcross.

Mr. C. E. Hendrickson and Mr. B. Gummere, for the motion.

Mr. G. S. Cannon and Mr. F. Voorhees, contra.

THE ORDINARY.

This is an appeal from a decree of the Burlington orphans court, refusing to admit to probate a paper writing, purporting to be a codicil to the will of Rachel N. Murphy, deceased. The decree was made and signed and filed on the 14th of December, 1882. The demand of appeal in writing was not filed until the 1st day of February, 1883, forty-three days after the filing of the decree. The statute governing appeals in such cases provides that the appeal must be demanded in thirty days after the order or decree. The respondent moves to dismiss the appeal on the ground that it was not demanded within the time limited by law for that purpose. The appellants insist (and their counsel so testify) that the appeal was in fact orally demanded within the thirty days, though a written demand was not filed within that period. They allege that an oral demand was made by their counsel in open court in the presence of the counsel of the respondent at the time when the decree was signed, and that their counsel afterwards, on the 26th of December, again demanded the appeal in open court. Their senior counsel testifies to this demand of appeal on both occasions, and their junior counsel testifies that he was present on the first one and understood and believed that an appeal was then demanded, and that the respondent's counsel so understood it. The counsel of the respondent, on the other hand, denies that he heard any demand of appeal, and the surrogate testifies that he was present at the signing of the decree; that no appeal was demanded from it or any part of it, and that nothing was said about appealing from it in his presence during the hearing upon the decree (to settle its form) nor at any other sitting of the court. The presiding judge states in a letter, read on this motion without objection, that he understood the appellants' counsel to say that he would appeal, and another of the judges says, in a letter referred to on the argument, that the counsel spoke of his intention to appeal. This, however, does

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not sustain the allegation that an appeal was then demanded, for what was said, according to the recollection of the judges, was only expressive of an intention to appeal, or, in the language of the statute, of an intention to demand an appeal.

The subject of the manner of demanding an appeal in such cases was fully discussed and considered, and carefully and elaborately decided by the ordinary (Chancellor Green) in *Hillyer v. Schenck*, 2 *McCart*. 398, over twenty years ago, and what was then declared to be the established practice has been observed ever since. It was there held that a mere *viva voce* demand of appeal is not sufficient. That is all there was in this case, conceding the utmost to the appellants. Nor does there appear to be any good reason for changing the practice. The case in hand is illustrative of the necessity of requiring that the demand of appeal shall be in writing. On the one side it is positively averred that the appeal was demanded. The other side did not hear it, nor did the surrogate, and what the judges heard was merely an expression of intention to appeal. From the record it appears that no appeal was demanded within the limited time. There was undoubtedly an intention to appeal, and the appellants' counsel supposed an appeal had been duly taken, but it was not taken according to the requirements of the established practice of the court—a practice founded on just and reasonable considerations—and I am therefore constrained to dismiss the appeal.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
MARCH TERM, 1883.

NATHAN GASKILL et al., appellants,

v.

EDMOND L. B. WALES'S EXECUTORS, respondents.

1. The principle of subrogation is one of equity merely, and it will accordingly be applied only in the exercise of an equitable discretion, and always with a due regard to the legal and equitable rights of others.

2. W. lent money to G. to be secured by mortgage of land on which, it was agreed between them, it was to be the first encumbrance; it being agreed that part of the money should be used in paying off two mortgages already on the land. The mortgage was given and the former ones were paid off accordingly. They were canceled of record by W.'s attorney. Before W.'s mortgage was given, the mortgagor had begun a building on the land, and lien-claims for money due for work and materials were subsequently filed against the house and curtilage, and they were sold under judgment and execution thereon. The purchasers at that sale had no notice of any claim or right except what

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the records showed.—*Held*, That W.'s claim, to be substituted in the stead of the former mortgagee to the extent to which his money was used to pay them off, could not therefore be allowed.

On appeal from a decree in equity by Parker, J., rendered in the Burlington circuit court, on the following opinion:

On the 8th day of March, 1872, Joseph Grubb was seized of a tract of land situated in the township of Burlington, in this county, containing twenty-two and seventy-one hundredths acres. On the 9th day of April, 1872, said Grubb executed a mortgage on the whole of said premises to Caleb Wilkins, to secure the sum of \$1,000. On the 9th day of April, 1873, said Grubb executed another mortgage to said Wilkins, on the same property, to secure the sum of \$200. On the 1st day of May, 1874, Grubb commenced the erection of a dwelling-house on said premises. On the 11th day of May, 1874, Grubb executed a mortgage on the whole tract to the complainant, to secure the payment of \$2,000, which mortgage was delivered and recorded on the 23d day of May, 1874. On the 23d day of May, 1874, the two Wilkins mortgages were canceled of record. On the 25th day of September, the whole tract of twenty-two and seventy-one hundredths acres was conveyed by Grubb to Walter A. Barrows.

On the 27th day of April, 1875, Laumaster & Wright filed in the Burlington county clerk's office a mechanics' lien-claim for \$255.95, against Joseph Grubb, builder and owner, on the building which had been erected on said tract of land, and the curtilage whereon the same was erected, which curtilage is described in the lien-claim as containing about one-half acre of land, for materials furnished for said building.

On the 4th day of May, 1875, Samuel E. Hancock filed a similar lien-claim for \$73.50; and on the same day Nathan Gaskill filed a similar claim, for work on said dwelling-house, for the sum of \$66.

Judgments were recovered and executions, both general and

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special, issued on said lien-claims, by virtue of which the sheriff sold the said dwelling-house and curtilage of one-half acre on the 11th day of December, 1875, to said Hancock, Laumaster and Wright.

On the 11th day of July, 1879, complainant filed a bill to foreclose his mortgage, which bill was amended on the 22d day of August, 1881.

The bill charges that the complainant's mortgage or part thereof is a first lien on the whole tract of twenty-two and seventy-one hundredths acres described therein; that, although the said mortgage of complainant was dated and recorded after the commencement of the building against which and its curtilage the said mechanics' liens were filed, yet that by reason of the complainant's paying to said Grubb, only a part of the moneys loaned to him, and paying the sum of \$1,294.50, the amount then due to said Wilkins on his said two mortgages, he is in equity entitled to have that portion of his mortgage which represents the moneys which he paid Wilkins for his said two mortgages decreed to be a lien on the whole of said mortgaged premises prior to said lien-claims, and prior to any right and interest which the purchaser at sheriff's sale, under the judgments obtained upon said claims, may have. And that he is entitled to be subrogated to the interest, estate and security in said mortgages which Caleb Wilkins had at the time he paid said Wilkins the amount of the said two mortgages held by him.

The question in the cause is whether the complainant is entitled to be subrogated to the rights Wilkins had at the time complainant paid him the moneys for his mortgages to the extent of such payments. If complainant be entitled to such subrogation, he has the first lien on the whole premises to the extent of what he paid Wilkins, and interest on the same from the time of payment, for Wilkins's mortgages were a lien on the whole premises, before and at the time the building was commenced; but if complainant is not entitled to such subrogation, the liens were prior to the whole of complainant's mortgage, because such mortgage was not executed until after the house was commenced.

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To determine this question of subrogation it is important to inquire what was said and done on the 23d day of May, 1874, the day when complainant's mortgage was recorded, the money paid by complainant, and the Wilkins mortgages canceled. Mr. Barrows is the only witness on this subject. His evidence is as follows, viz. :

"I am a practicing attorney-at-law, and was also practicing in 1874; in the spring of that year Joseph Grubb, of the township of Burlington, applied to me for a loan of \$2,000, to be secured on a first mortgage on his farm, which is the farm described in complainant's mortgage and bill; I suggested the application for this loan to the complainant, and he agreed to make the loan to Grubb on condition of having the first lien on the farm in question for security; the record then showed, what Grubb had already informed me, that there were two mortgages on this farm made to Caleb Wilkins; I also learned that Franklin B. Levis, Esq., was then acting as attorney for Caleb Wilkins in the collection of these two mortgages; when the money was furnished to me by complainant to complete the loan to Grubb, in pursuance with the agreement that complainant was to have the first lien upon the premises, and at the request of Joseph Grubb, I paid to Franklin B. Levis, attorney of Caleb Wilkins, out of the money so loaned by complainant to Grubb, the principal and accrued interest of the two mortgages held by Wilkins; one of these mortgages was for \$1,000, and bore date April 9th, 1872; interest was due on it from April 9th, 1873; the other mortgage was for \$200, and bore date April 9th, 1873; interest was due on it from its date; the amount so paid by me in satisfaction of these two mortgages was \$1,294.51; I paid this sum to Mr. Levis and received from him the two mortgages; I then caused the two mortgages to be satisfied of record, and placed complainant's mortgage upon record; all this was done on the 23d day of May, 1874."

Upon cross-examination, Mr. Barrows says :

"In carrying out the loan of this money Mr. Wales took no part in it except furnishing the money and requiring a certificate of the record, that is, of the liens upon it; I acted as his agent in perfecting this loan; Mr. Wales compensated me for making the said loan."

Mr. Barrows further testifies that he understood he was also acting for Grubb, for securing and perfecting the loan to him. And that he does not remember what he did with the Wilkins mortgages, and his old papers being stored away, he does not know whether they are in his possession or not. He adds that

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his aim was and he intended to have the Wales mortgage a first lien, according to the agreement, and all he did was to that end.

Mr. Barrows was agent of complainant in the transaction, and his agreement and acts must be considered the agreement and acts of the complainant.

It will be observed that the debtor Grubb, upon the negotiation of the loan, and at its consummation, agreed that complainant should have the first lien on the mortgaged premises to secure the money he was about loaning. To make it certain that he should have the first lien, complainant took it upon himself to see that the Wilkins mortgages should be paid. He did not give all the money to Grubb, to do with it as he might see fit, but he gave Grubb only a part of the money, reserving an amount sufficient to take up the Wilkins mortgages. He did pay these mortgages and they were delivered to complainant, and not to Grubb. Subrogation is the substitution of a new for an old creditor in succession to his rights.

When a man pays a debt which could not properly be called his own, but which it was his interest to pay, the law subrogates him to all the rights of the creditor. *2 Bouv. Law Dic. 417.*

This definition includes the case now under consideration. The complainant paid the debt, not his own, but which it was his interest to pay.

I have examined all the cases on this subject that were cited on the argument, many of them do not apply, but a few are directly in point. In *Coe v. New Jersey Midland R. R.*, 12 C. E. Gr. 113, *Paine v. Hathaway*, 3 Vt. 212 is referred to approvingly. In that case it was held that if a person who has agreed with a debtor to advance money, to be secured by mortgage on land, to discharge a debt secured by encumbrance on that land, himself pays the debt with the money and discharges the encumbrance, he is not to be regarded as a volunteer; and after such agreement with the debtor, he will not be considered a stranger with regard to the debt he has paid, but in equity will be entitled to the benefit of the security which he has satisfied. In *Homeopathic Mut. Ins. Co. v. Marshall*, 5 Stew. Eq. 112, it was held that the complainant was entitled to the rights of the mortgagee

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whose mortgage was paid, where the encumbrance was on the property when the money was loaned to pay the mortgage.

The facts of the case reported in *Barnett v. Griffith*, 12 C. E. Gr. 201, are almost identical with those proved in this case. The complainant in that case had advanced the money paid on two former mortgages on security of his mortgage, and to release the premises from the encumbrance of those mortgages which were prior liens to his mortgages and to lien-claims. It was held that complainant was entitled to be subrogated to the rights of the mortgagee, under the two mortgages, to the extent of the money paid for them and interest thereon.

It is clear that complainant is entitled to be subrogated to the rights of Wilkins in the two mortgages he paid.

These mortgages were prior to the commencement of the building on which defendants' liens were filed. Complainant's lien for the amount of those two mortgages and the interest thereon, from the time complainant paid the same, is first in order of priority.

Let there be a decree to sell the whole of the premises, and that there be paid out of the proceeds of sale in the first place to the complainant, the sum of \$1,294.50, the amount paid by complainant for the two mortgages, which were given to Caleb Wilkins, and interest thereon from the 23d day of May, 1874, and costs of complainant, and in the next place to the defendants, Samuel E. Hancock, Henry Laumaster and Noah E. Wright, the purchasers under the lien-judgments, the sum due on said judgments, principal, interest and costs, on the day of the delivery of the deed by the sheriff to them, December 11th, 1875, being the sum of _____ and in the third place to pay the balance of complainant's mortgage.

Mr. F. Voorhees, for appellants.

Mr. W. A. Barrows, for respondents.

The opinion of the court was delivered by

THE CHANCELLOR.

This is an appeal from a decree of the Burlington circuit court

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in a suit for foreclosure of a mortgage held by the respondents' testator, Dr. Edmond L. B. Wales, on land in that county. The mortgaged premises are a tract of twenty-two and seventy-one hundredths acres. They were owned on the 11th day of May, 1874, by Joseph Grubb, and were then subject to two mortgages thereon, given by him to Caleb Wilkins, one for \$1,000 and interest, and the other for \$200 and interest. On that day Grubb borrowed of Dr. Wales \$2,000 on mortgage of the property, and it was agreed between them that the mortgage should be the first lien thereon. It was given accordingly. With part of the \$2,000 the Wilkins mortgages were paid, and they were then, by direction of Dr. Wales's attorney, canceled of record. On the 1st of May, 1874, a few days before the Wales mortgage was given, Grubb began the building of a dwelling-house on part of the property. The firm of Laumaster & Wright and Samuel E. Hancock furnished materials for the house, and Nathan Gaskill did work thereon. They filed and prosecuted to judgment lien-claims under the mechanic's lien law, for money due them therefor, and under executions on those judgments the dwelling-house and the curtilage thereof were sold, December 11th, 1875, to Hancock and the firm of Laumaster & Wright. The respondents claim that they are in equity entitled to be subrogated to the rights which Wilkins had under his mortgages when they were paid off, to the extent to which the money lent by their testator was used in the payment of those mortgages, and that for that amount and interest they are entitled to priority over the purchasers of the property under the lien-claims. The principle of subrogation is one of equity merely, and it will accordingly be applied only in the exercise of an equitable discretion, and always with a due regard to the legal and equitable rights of others.

In the case in hand, the Wilkins mortgages were canceled of record, and the purchasers under the executions had no notice of any kind of the existence of any claim to the equity. They had no notice except what the records afforded. To give the respondents' mortgage priority over the lien-claims would therefore manifestly be highly unjust to the purchasers who bought

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in ignorance of any right or claim to such priority. In the absence of any other notice they, of course, had a right to rely on the condition of the records, and having done so they cannot be defeated or prejudiced by a latent equity. Their title, therefore, to the dwelling-house and curtilage is paramount to the respondents' mortgage. The decree will be reversed, with costs, with directions to the circuit court to enter a decree for the foreclosure and sale of the rest of the property only.

Decree unanimously reversed.

HENRY M. DENTON et al., appellants,

v.

LYDIA A. CLARK, respondent.

1. Legacies which, with respect to amounts, are left in blank cannot be used to aid in construing the will.

2. When a power to sell lands is vested in two executors or the survivor of them, the clause describing them as executors and not by their names, if one of them be removed from the office, the power becomes lodged in the remaining executor.

3. The case of *Weimar v. Fath*, 14 Vr. 1, approved.

On appeal from a decree of the chancellor, whose opinion is reported in *Clark v. Denton*, 9 Stew. Eq. 419.

Bill for the specific performance of a contract for the purchase of lands. The defendant set up that the title of complainant was defective. The complainant in the court below, who was the respondent in the appeal, acquired title as follows: Hosea F. Clark, husband of the complainant, died seized of the premises in question, and his will contained the following clauses, viz.:

"*Item.* All the rest and residue of my houses and lands and real estate remaining and not hereinbefore particularly devised, whatsoever and wheresoever situate and being, I hereby *authorize, empower and direct* my said executrix and executors, the survivors and survivor of them, *within one year after*

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my decease, or within such further time as they may deem advantageous and to the best interest of my estate, to bargain and sell, either at public or private sale, as they may deem best, to any person or persons, and for such price and prices and on such terms as they may think proper, hereby authorizing them to receive in part payment at such sale or sales part consideration mortgages on such liberal terms as they may deem prudent and advantageous to my estate; and for all the said houses and lands and real estate so to be sold, when sold as aforesaid, I hereby empower my said executrix and executors, the survivors and survivor of them, to make, execute and give to the purchasers thereof respectively, good and sufficient deeds in the law for the transfer thereof.

"Item. The rents arising from any houses and lands and real estate which I have directed to be sold, from the time of my decease to the time of such sale and conveyance, after paying thereout all taxes, assessments, repairs and interest on mortgage encumbrances, if any, as the same may be chargeable from time to time, I instruct and direct my executrix and executors, the survivors and survivor of them, to pay over in quarterly installments, and in the following proportion, as bequests which I give to the following persons, to wit:

"To my beloved wife, Lydia Ann Clark, an equal one-sixth part thereof; to my daughter, Mary Fannie Brown (wife of Archibald K. Brown), an equal one-sixth part thereof; to my son-in-law, the said Archibald K. Brown, an equal one-sixth part thereof; to my daughter, Anna Elisabeth Pearsall (wife of William Pearsall), an equal one-sixth part thereof; to my son-in-law, the said William Pearsall, an equal one-sixth part thereof; and the remaining one-sixth part thereof I reserve to be applied to the education of my grandchildren, and direct my trustees hereinafter named to pay, from time to time from the fund created from this said remaining one-sixth, in such sums as may be required, on account of the suitable education of my said grandchildren, and for their education, or the education of any or either of such grandchild or children whom my said wife and my said daughters may agree and determine to educate."

The respondent was executrix of this will and William A. Lewis executor. The respondent, on her own petition, was discharged from the "duties of her office of executrix," and subsequently the land in question, being a part of the residue of the testator's estate, was sold by the remaining executor, and the respondent became the purchaser at that sale. The title thus acquired was the one which by his bill he insisted the appellant should take in compliance with his contract.

In the will of Mr. Clark there were a number of legacies given to various persons, with the amounts left in blank.

Mr. A. Q. Garretson, for appellant.

Messrs. Collins & Corbin, for respondent.

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The opinion of the court was delivered by

BEASLEY, C. J.

The first justification attempted by the appellant of his refusal to complete his contract to purchase the lands in controversy, is that the testamentary power, given to the executors by the will in question, had failed when the sale was made, because the purpose for which it had been given did not arise. It is an unquestionable rule of law, that in cases in which an authority of this kind is created with an intent to effect a certain end, and the condition of affairs becomes so changed that such end cannot be attained, or is reached without a resort to such power, that the right to exercise such power, *ipso facto*, ceases. This was the substantial ground of decision in *Moore v. Moore*, 12 Vr. 440, and in *Brearley v. Brearley*, 1 Stock. 21. The reason of the rule is that the testator meant to have the land converted into money for a certain purpose only, and such purpose failing, he did not intend it to be converted. In the application of this rule to the present case the appellant contends that the power to sell these lands was given to the executors, to subserve the purpose of raising funds to pay the amounts which the testator intended to insert in the legacies which were left in blank in that respect. But this position is both illogical and without any legal basis to be rested on. It is illogical because it attributes to the testator the creation of a power to convert his lands into money, in furtherance of a purpose which had been abandoned by him at the time he executed his will; and it is destitute of all legal foundation, because clauses in a will which are so incomplete as to be inoperative, are not admissible as exponents of a testamentary purpose. The question always is, what the testator meant when he put his will in force by the act of executing it; and when, knowingly, at that period, he permits clauses to be so incomplete as to be nugatory, such clauses are no part of the testamentary plan, and consequently can reflect no light upon such plan. To allege, therefore, that the power of sale in this will had no other intent than to effect a purpose that had been entirely surrendered, is, in

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effect, to allege that it was left in this instrument by the mistake of the testator. Such a contention is not tenable.

Discarding, then, the inchoate elements just mentioned, and turning to the will in its operative parts, the intention of the testator, in the respect in question, is not involved in the least degree of uncertainty. It is plain that the testator's intent was, by the conversion of his lands into money, to make a convenient and equal distribution of it among the beneficiaries named by him in his will. Such a purpose is legibly written in the clause creating the authority in the executors to convert the lands, which is a general empowerment and direction to them to sell within a year after his decease, or within such further time as they may deem advantageous; as well as in the auxiliary clause, which distributes the net rents of such lands, from the time of his "decease to the time of such sale," among his wife, two daughters, his two sons-in-law, and the remaining sixth to be applied to the education of his grandchildren. Now it is obvious that if this direction ever could go into effect, it would continue during the lives of these several devisees, unless a sale should have been made by the executors. That the testator did not design these rents to be distributed for any great length of time is perfectly manifest from the circumstance of his direction to put an end to that state of things by a sale within the period of a year from his demise, unless such sale should appear injudicious. It is impossible to carry into effect the evident scheme of this will without putting the duty upon the executors to dispose of this land and convert it into money as soon as was reasonably practicable. I conclude, therefore, that the power to make the sale was conferred upon the executors by this testament; the remaining question is, whether it was well executed.

The objection to the sale, raised from the mode in which it has been executed, is that the testamentary power is conferred on the two executors and the survivor of them, and not on a single executor, who is not a survivor. The executrix was formally removed from her office, but this, it is said, does not make the remaining executor, in the legal sense, the survivor of the two. Without stopping to consider or discuss this latter assumption, it

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is sufficient to say that the subject has recently received a careful treatment by the supreme court of this state, in the case of *Weimar v. Fath*, reported in 14 Vr. 1. The doctrine there maintained is that when a will gives executors in their official capacity, a power to sell, without naming the individuals who are to be clothed with such capacity, and to which class the present case belongs, and one of such executors is removed from the office, the power to sell survives, and can be legally executed by the remaining executor. The principle thus promulged is deduced as well from the common law as from the statutory law of this state, and it would be useless to repeat on this occasion the reasoning, or recite the authorities which conduced to the result just stated. There was no fault in the mode in which the testamentary power was exercised in the present instance, and the decree appealed from should, consequently, be affirmed.

Decree unanimously affirmed.

GEORGE C. HIGGINS AND JACOB F. HIGGINS, appellants,

v.

FLEMINGTON WATER COMPANY, respondents.

1. A diversion of a water-course by the authority of a riparian proprietor to enable a company to supply, in part, a village with water, is a legal wrong to another riparian owner who thereby sustains a perceptible and substantial damage.

2. As between co-proprietors such a diversion is not a reasonable use of the common property.

3. After entertaining a bill for such a wrong, and settling on final hearing the legal right of the complainant, a court of equity will not send him to law for redress, but will enjoin the defendant from making such diversion.

On appeal from a decree advised by Advisory Master Dodd, dismissing the appellants' bill.

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Mr. John Schomp and Mr. J. G. Shipman, for appellants.

The complainants had a *right* to come into the court of chancery at the time they did, and it was the duty of the court of chancery, under every aspect of the case, to have retained the bill and controlled the suit, though they had modified the injunction. *Cooper v. Carlisle*, 6 C. E. Gr. 576; *Lehigh Valley R. Co. v. Society &c.*, 3 Stew. Eq. 162; *Farrell v. Richards*, 3 Stew. Eq. 514; *Aquackanonck &c. v. Watson*, 2 Stew. Eq. 368; *Shreve v. Voorhees*, 2 Gr. Ch. 25; *Van Houten v. Coventry*, 10 Barb. 522.

Actual, perceptible damage is not indispensable as the foundation of even an action at law; it is sufficient to show the violation of a right. *Ashley v. White*, 2 Ld. Raym.; *Becket v. Morris*, L. R. (1 H. of L.) 47-60; *Embrey v. Owen*, 4 Eng. L. & Eq. 475.

"The general doctrine," says Harris, J., in *Van Hosen v. Coventry*, 10 Barb. 520, "relating to water-courses, is, that every proprietor is entitled to the use of the flow of the water in its natural course, and to the *momentum* of its fall on his own land." And then he quotes the very language by the late vice-chancellor in the case above cited, taken from 3 Kent's Com. 439, and Angell on Water-Courses §§ 90, 94. See, also, *Blunchard v. Baker*, 8 Me. 253; *Well v. Portland Manufacturing Co.*, 3 Sumn. 189; *Bullard v. Saratoga Co.*, 77 N. Y. 529; *Wilts and Berks Canal Navigation Co. v. Swindon Water Works Co.*, L. R. (9 Ch. App.) 451; *Earl of Sandwich v. Northern Railway Co.*, L. R. (10 Ch. Div.) 707.

The defendants have no authority by their charter to take this water. *Bennett v. Parsons*, 10 Cush. 367; *Embrey v. Owen*, 4 Eng. L. & Eq. 466.

Mr. H. C. Pitney, for respondents.

I. The inhabitants of Flemington have the right, as against the complainants, to use to exhaustion the Bushkill brooklet for ordinary domestic purposes, and the taking in the place and stead of its waters those of the South Branch is a mere *exchange*

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which does not injure the complainants. *Angell on Water-Courses* (ed. 1869) §§ 93, 93 a, 117-121; *Miner v. Gilmour*, 12 Moo. P. C. 156; *Nuttall v. Bracewell*, L. R. (2 Ex.) 9; *Wood v. Waud*, 3 Exch. 748, 780; *Wilts and Berks Canal Co. v. Swindon Water Works Co.*, L. R. (9 Ch. App.) 451; *S. C. on appeal*, L. R. (7 E. & I. App. Cas.) 697; *Roberts v. Richards*, 44 L. T. R. 271, 23 Alb. L. J. 498; *Bullard v. Saratoga Co.*, 77 N. Y. 525, 529; *Evans v. Meriweather*, 3 Scam. 496; *Arnold v. Foote*, 12 Wend. 330; *Wadsworth v. Tillotson*, 15 Conn. 366; *Weston v. Alden*, 8 Mass. 136; *Anthony v. Lapham*, 5 Pick. 175; *Blanchard v. Baker*, 8 Me. 253; *Davis v. Getchel*, 50 Me. 602; *Embrey v. Owen*, 6 Exch. 353; *Baltimore v. Appold*, 42 Md. 442; *Elliott v. Fitchburg R. R.*, 10 Cush. 191; *Earl of Sandwich v. R. R.*, L. R. (10 Ch. Div.) 707; *Garwood v. N. Y. Cent. R. R.*, 83 N. Y. 400; *Philadelphia v. Commissioners*, 7 Pa. St. 348.

The cases of *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, and *Acquackanonck Water Co. v. Watson*, 2 Stew. Eq. 367, are not in conflict with the authorities above cited nor the position they maintain. The point that the water companies in those cases had the right to use the waters of the streams in question to supply inhabitants who were riparian proprietors, and as such entitled to use the waters thereof, was not taken in either case, and it did not clearly appear in either case that they were such proprietors. This right of substituting water from one source for that from another was fully recognized and acted upon in the famous case, *Society v. Canal*, Sax. 157.

II. The amount proposed to be taken is so small that the maxim *de minimis* applies. *Wood v. Waud*, 3 Exch. 748; *Quackenbush v. Van Riper*, 2 Gr. Ch. 350; *Van Winkle v. Curtis*, 2 Gr. Ch. 422; *M. & E. R. R. Co. v. Prudden*, 5 C. E. Gr. 530; *Cooper v. Carlisle*, 6 C. E. Gr. 576.

III. We contend that the complainants have not made out such a clear case of legal right as to entitle them to the interference of the court to prevent so small an injury which is not irreparable. Courts of equity only interfere to restrain such

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small injuries when, although they are properly classed as irreparable, the right is clear. *Prudden v. M. & E. R. R.*, 5 C. E. Gr. 530.

The opinion of the court was delivered by

BEASLEY, C. J.

The complainants, who are the appellants here, filed their bill to enjoin the defendant from diverting part of the water of an ancient water-course from their mill. The facts which must be taken as established are these: The complainants' property is situated on the South Branch of the Raritan river, which is a stream of considerable volume except in times of drouth; the defendant is a corporate body, constituted for the purpose of supplying the village of Flemington with water, and to that end, finding its supply of water from other sources insufficient, contracted with the owners of a mill on the stream in question, to pump from such stream, at a point above the premises of the complainants, and to force through pipes into its reservoir, such a quantity of water as would form the complement of its resources. This supplementary supply was necessary only in times of scarcity of water, and at such times, the natural stream, if left undiminished, was insufficient for the purposes of the complainants; and the *quantum* which would be thus abstracted by the defendant, though not very great, would be of such magnitude as to work a sensible and essential detriment to the complainants, and would therefore be of a character that its abstraction cannot be disregarded by force of the maxim *de minimis &c.*

On the part of the defence the application for the injunction on final hearing was resisted on two grounds: the first of these being the contention that as the mill-owners, with whom the defendant had contracted for the additional supply of water, were riparian proprietors, it was clothed with the rights appertaining to such ownership, one of such rights being the legal authority to take water from the stream for the uses to which it was applied. The exact assumption of this proposition is this, that a riparian proprietor can lawfully not only use the water as it

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passes over his property for his own domestic, agricultural or similar purposes, but that, although such an appropriation works a palpable damage to a riparian owner further down the stream, he can sell out the use of such water to strangers, and that it may be diverted to lands not riparian for the purposes of such alienation. But I have, in my researches, altogether failed to find either any authority or any legal principle which will sustain this position. The definitions of Chancellor Kent in his Commentaries, of the legal title of riparian proprietors, have been frequently quoted with approbation by the courts of England and of this country, and yet, as long ago as the year 1816, this great lawyer decided, in a case that I believe has never in any wise been questioned, that the legal power to make such a diversion of the water as is here claimed did not exist. The case referred to is that of *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. Ch. 162. The facts were these: the complainant's farm was crossed by a stream which came from a spring arising in an adjacent farm, and the defendants, who had been authorized to supply the village of Newburgh with water, had obtained leave of the owner of such spring to use and divert the water or a part of it, for the purpose mentioned. If the owner of this spring had possessed the right to transfer to a water company the privilege of using the water of the stream for domestic purposes, to the deprivation of other owners of land upon the water-course, the complainant in the Newburgh case would have been in court destitute of all legal or equitable standing-ground; but such was not the view taken by the court of the situation, for it was held that the defendants, by force of these contracts with the owner of the spring, gained no right to make the diversion complained of, and that the complainant's claim to equitable protection was so clear that he was entitled even to a preliminary injunction. This decision was cited as authority in this state in *Van Winkle v. Curtis*, 2 Gr. Ch. 427.

And it appears to me that viewed in the light of all the legal decisions which upon this subject have been since made, this case is to be considered as having been correctly adjudged. The general principles of law which define the rights in these natural

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streams, arising from riparian proprietorship, have become now firmly established by a long line of adjudications. Thus it is settled that the right to flowing water is an incident to the proprietorship of the lands along or over which such stream flows; that such right is common among all such proprietors, and that each of them is entitled to its reasonable use, and that so long as such use be reasonable a co-proprietor cannot complain of the consequences of such appropriation. Thus, beyond all question, a riparian proprietor may use the passing water, in a reasonable manner, for domestic uses, or for the irrigation of his lands, or doubtless for other purposes, under the same restriction. The cases cited in the learned brief of the counsel of defendant illustrate and exemplify this doctrine. Thus, in the important case of *Embrey v. Owen*, 6 *Exch.* 353, it was declared that, in a suit for the diversion of part of the water of a stream, it was properly left to the jury to settle the case on the point whether or not they found there had been a sensible diminution of the water by reason of the diversion. The diversion had been made by a riparian proprietor for the purpose of irrigation, and it was therefore plain, according to the law as just stated, that an abstraction from the stream for such a purpose, which produced no sensible diminution of the stream, could not be said to be an unreasonable use of the water. The case of *Elliot v. Fitchburgh Railroad Co.*, 10 *Cush.* 191, is founded on similar principles. This was the case of a railroad company, which, by an arrangement with a riparian proprietor, had diverted a small quantity of water from a stream for the purpose of furnishing their steam engines with water, and the court, on review of the rulings of the judge at the trial, maintained that an instruction to the jury to the effect that "unless the plaintiff suffered actual, perceptible damage in consequence of the diversion, the defendants were not liable" in the action, was correct. The reason of these decisions is stated in the former of these two cases just cited: "so long," says the court, "as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie."

These cases, as well as the others to the same effect contained

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in the brief of counsel, were, beyond all doubt, correctly decided; and they are all of them obviously hostile to the pretensions of the defence in the present case; for it has been already stated that in the present instance the diversion which is here threatened will work an actual and perceptible damage to the complainant, and these authorities, as we have seen, explicitly held that for such a diversion an action is maintainable. The instruction to the jury in each of these rejected cases just considered was to the effect that the plaintiff must succeed, if it appeared from the evidence that the diversions of the water had, according to the instruction to the jury in one case, occasioned a sensible diminution of the water, or as it was expressed by the trial-judge in the other, had produced "an actual and perceptible damage" to the plaintiff. By the test of the rule thus applied there can be no question with respect to the present complainant's right to a legal remedy for the diversion of the water by the respondent. In estimating the extent of the wrong done the complainant, it is also to be remembered that the damage is of a kind to increase as time passes, for as the population of the village enlarges, the supply of water must be proportionately extended; and that this diversion is made under a claim of right, which, if continued, will, after the lapse of the requisite period of time, grow into a legal right. It seems to me that it is entirely clear that the complainant has sustained a wrong by this act of the defendant, which entitles him to legal redress.

The next position taken in behalf of the defendant is, that even if the subtraction of this water is to be held to be wrongful with respect to the complainant, still a court of equity will not give relief by way of injunction, but will leave the parties injured to their remedy at law.

If this were an application for a preliminary injunction it is clear that an objection of this kind should prevail, for the act which the defendant threatens to do is obviously not of a character to inflict any irreparable injury. But after a court of equity has entertained a bill, and, instead of sending the case to a trial at law, has itself tried the questions of fact involved, and settled the legal right in favor of the complainant, it certainly

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would be a result much to be deprecated, if, at such a stage of the controversy, it was the law that the chancellor were required to say to such a complainant, "Your right is clear; if you sue at law you must inevitably recover, and after several such recoveries, it then will be the duty of this court, on the ground of avoiding a multiplicity of suits, to enjoin the continuance of this nuisance; still, you must go through the form of bringing such suits, before this court of equity can or will interfere." In those cases in which, to the mind of the chancellor, the right of the complainant is clear, and the damage sustained by him is substantial, so that his right to recover damages at law is indisputable, and the chancellor has considered and established his right, I think it not possible that any authority can be produced which sustains the doctrine contended for by the counsel of the defendant. For an example of such a proceeding we are referred to the case of *Earl of Sandwich v. The Great Northern Railway Co., L. R. (10 Ch. Div.) 707*, but the authority is not relevant to the point, for the vice-chancellor expressly states that the complainant had suffered no damage. Speaking of the complainant, he says: "What injunction is he entitled to? Is there any damage done to him? It is not pretended that there is any damage done to him." This case, therefore, belongs to that class before referred to, where an abstraction of water has been made in a reasonable manner by a riparian proprietor, and where such abstraction does not operate to the detriment of other proprietors, and, as I have already stated, under such circumstances no wrong is done if the transaction be measured either by the rules of law or of equity. But in the present case if the injunction be refused it must be refused in the presence of the facts that there has been a diminution of this stream to the substantial detriment of the complainant, and a judgment on final hearing to that effect, so that a recovery would follow as a matter of course if suits at law should be brought. Under such conditions of fact has a court of equity ever promoted such useless litigation? It is impossible to conceive what benefit would result to either of the litigants from such a course. If this water company is

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doing a legal wrong, injurious to the complainant, such wrongful conduct must, if persisted in, either now or hereafter, be restrained in equity. After the rights of these parties have been settled in this court, suits at law, founded in this diversion of this stream, would be mere assessments of damages. Judgments in such actions, as a matter of course, must pass in favor of the complainants. To be prohibited, therefore, from doing the wrongful act, which must lead to such results, cannot be regarded, with respect to the defendant, as anything inequitable. Nor, under such circumstances, can a court of equity rightly withhold its hand on the ground of any supposed inconvenience to those who are the customers of this company. In a similar situation the English chancellor refused to listen to such an appeal. Such an appeal was made in the case of the *Attorney-General v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304. The complaint was, that vegetables growing in the market-garden of the complainant were injured by the gas of that company, and when the argument was pressed that this injury was slight in comparison with the benefits conferred by the company on the public, and that on that account this court would not exercise its power to restrain the manufacture of the gas, Lord Cranworth uses this strong language: he says, "If it should turn out that this company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on." He further remarks, "but unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only to be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law, and I quite agree with the vice-chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas."

My conclusion is, that this decree should be reversed, and the

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defendants should be enjoined from abstracting such quantities of water from this stream and at such times as will be detrimental to the full enjoyment of the stream by the complainants. The terms and extent of the injunction being left to the judgment of the chancellor upon the case as it stands, or upon further inquiry to be made by him.

Decree unanimously reversed.

In the matter of BENJAMIN L. JAMES, an alleged lunatic.

On appeal from a decree of the chancellor, whose opinion is reported in *James's Case*, 8 Stew. Eq. 58.

Mr. A. Flanders, for appellant.

Mr. C. E. Hendrickson, for respondent.

The opinion of the court was delivered by

BEASLEY, C. J.

In my opinion, the testimony taken under the inquisition in this case did not satisfactorily show that the subject of it was of unsound mind, and I therefore think the decree should be reversed and the case remitted, with instructions that the appellant be permitted to traverse the inquisition, or that an issue be directed.

Decree unanimously reversed.

Hackensack Water Co. v. De Kay.

THE HACKENSACK WATER COMPANY, RE-ORGANIZED,
et al., appellants,

v.

MINNA DE KAY et al., respondents.

1. A suit for the foreclosure of a mortgage, given by a corporation to a trustee to secure a number of negotiable bonds issued under legislative power, is for the benefit of all the bondholders, whether the bill be filed by the trustee or by the holder of some of the bonds, making the trustee a defendant therein; and the holders of other bonds may come in and prove before the master without making themselves parties to the suit.

2. Where lands of an insolvent corporation are subject to a mortgage which is in dispute, an order may be made directing a sale, free from the mortgage, leaving the validity of the mortgage to be determined when the proceeds of the sale are disposed of. But a sale by a receiver, under an order directing a sale by public auction, without any mention of prior liens or encumbrances, will transfer the property to purchasers, subject to the lien of whatever encumbrances may be upon it, with the right of the purchaser, nevertheless, to contest the validity of apparent encumbrances, either with respect to their legal existence or the amount due upon them.

3. An officer selling under judicial process has a naked power to sell according to the mandate of the court. He may adopt conditions of sale amply sufficient to secure compliance by purchasers with their bids, but he cannot impose any liability upon purchasers with respect to the property sold which would not result by law from the purchase.

4. A purchaser at a sale by a receiver, whose conditions of sale state that the property will be sold "subject to all legal liens and encumbrances thereon," is not estopped from contesting the validity of a prior mortgage upon the premises.

5. As in favor of creditors and third persons dealing with a corporation in good faith, the regularity and validity of its organization, effected under color of its charter, cannot be impeached, and the acts of its officers, who are officers *de facto* under color of an election, are binding upon the corporation.

6. In some cases an obligation made by a corporation is validated by the fact that the corporation has had a benefit under the contract, from which arises an obligation to pay the debt in common with other debts, but where a creditor claims a mortgage security which gives him a lien on the property of the corporation in priority over other creditors, he cannot maintain his security unless he establishes the validity of his mortgage as an encumbrance, which the corporation had power to make.

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7. Persons dealing in the negotiable securities of a corporation are chargeable with notice of the power of the corporation to make such securities as conferred by its charter. If the power granted by the charter is subject to a condition relating either to the form in which such securities shall be made in order to be valid, or relating to some preliminary proceedings extraneous to the acts of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defences in consequence thereof, even in the hands of *bona fide* holders.

8. But this doctrine does not prevail in those instances in which the right to issue such securities is by the charter conditioned upon the performance of acts by the corporation or its officers, relating to the management of the affairs of the corporation. In such cases, if a person dealing with the corporation finds the acts to be within the scope of its powers under its charter, he has a right to assume that all such conditions have been complied with.

9. The doctrine which validates securities of a corporation within its apparent powers, but improperly, and therefore illegally, issued for the want of acts to be done by the corporation or its officers in the management of its internal affairs, applies only in favor of *bona fide* holders for value. A person who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled, is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a *bona fide* holder of the same security. *Leggett v. N. J. & M. Banking Co.*, Sax. 542, explained.

10. The Hackensack Water Company was incorporated in 1869, with a capital of \$50,000. The charter provided for an organization as soon as \$20,000 of the capital stock should be subscribed and paid in. In 1873, the corporation was organized and directors elected. Very little of the stock had then been subscribed, and less of it had been paid in. The directors were not qualified for the office, and were irregularly chosen. Under this organization, the company bought and took title for lands in its own name, constructed its works, acquired property to a considerable amount, and contracted debts to a larger amount. On a bill to foreclose a mortgage made by the corporation—*Held*, that the corporation was a corporation *de facto*, and its directors officers *de facto*, and that the acts of the latter were binding on the corporation.

11. The charter authorized the company to increase its capital to \$100,000. The charter also empowered the company to borrow money not exceeding two-thirds of the capital paid in, and to secure the same by bonds and a mortgage upon its property and franchises. In August, 1873, a resolution was passed to increase the capital to \$100,000. In September, 1873, the directors adopted a resolution that one hundred and thirty-three bonds, of \$500 each, be issued, payable to a trustee or bearer, with coupons for the semi-annual interest. The bonds authorized by this resolution, and in fact issued, amounted to \$66,500, nearly two-thirds of the capital authorized when increased. At that time not over \$2,000 of capital had been paid in. In a suit to foreclose a mortgage made in pursuance of this resolution, duly executed under the corporate seal—

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Held, that the mortgage, being within the powers granted by the charter, and on its face having the appearance of being within the company's power to mortgage, was a valid security in favor of *bona fide* holders of the bonds, notwithstanding the directors acted illegally in making the mortgage and the bonds, and putting the bonds in circulation without first obtaining subscriptions to the capital to be made and paid in sufficient in amount to justify them in making the mortgage.

On appeal from a decree of the chancellor.

The case in the court of chancery is reported in *9 Stew. Eq.* 37, under the name of *De Kay v. Voorhis*.

The Hackensack Water Company was incorporated by an act of the legislature, approved March 12th, 1869, with a capital of \$50,000, with the privilege of increasing the same to the amount of \$100,000. *P. L. of 1869 p. 133*. By section 13 it was empowered to borrow money, not exceeding two-thirds of its capital stock paid in, and to secure the same by bonds and mortgage upon its property and franchises. On the 1st of August, 1873, three of the five incorporators held a meeting, and it was then resolved that the capital stock should be increased to \$100,000, and books were opened for subscriptions to the capital stock. The first election of directors was held August 23d, 1873.

In the summer of 1873 the company purchased in its own name the lands whereon to erect its pump-house and reservoir and other necessary works, and contracted with R. C. Bacot and J. F. Ward to construct the same for the sum of \$125,000. The contractors constructed the works, completing them before the 1st day of September, 1874, and in October, 1874, the company began to furnish water to its customers in the village.

At a meeting of the board of directors, held on the 26th of September, 1874, it was resolved that one hundred and thirty-three bonds of \$500 each, dated September 15th, 1874, payable November 1st, 1890, bearing interest at seven per cent. per annum, payable half-yearly, with coupons attached, be issued in due form of law to Henry H. Voorhis, trustee, and that a mortgage on all the real estate and property, rights and franchises, of the company, be executed and delivered to said trustee in due

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form of law to secure the payment of said bonds, and that the treasurer be authorized to negotiate said bonds to the best advantage of the company in his judgment. In pursuance of this resolution, one hundred and thirty-three bonds, each in the sum of \$500, and amounting in all to the sum of \$66,500, were issued under the seal of the corporation, signed by its president and attested by its secretary. These bonds were payable to Henry H. Voorhis, trustee, or bearer, with interest payable semi-annually on presentation of the interest coupons annexed thereto at the First National Bank of Hackensack. Each bond contained a recital that it was one of a series of like amount and date, amounting to \$66,500, all secured by a mortgage on the lands, property, privileges, chartered rights and franchises of the Hackensack Water Company, duly executed and delivered by the company to said trustee; and on each was endorsed a certificate signed by the trustee, certifying that the bond was secured by the mortgage therein described. The company also executed a mortgage to the trustee, under its corporate seal, upon its lands and all its rights, powers, privileges and franchises, to secure the payment of these bonds, and providing that the principal sum thereof should become due upon any default in the payment of interest for the space of thirty days. The mortgage is dated September 15th, 1874, was proved October 8th, 1874, recorded October 13th, and was delivered to the trustee about the latter date.

The company, being indebted to Bacot and Ward on their contract for the construction of its works, on the 5th of December, 1874, delivered to them, on account of such indebtedness, forty-eight of the said bonds. A balance still remaining due, Bacot and Ward brought suit and recovered a judgment for \$13,964 and costs, and as judgment creditors, March 19th, 1879, filed a bill against the company as an insolvent corporation; a decree of insolvency was obtained, a receiver was appointed, and the property and franchises were sold by the receiver August 18th, 1880. Bacot and Ward became purchasers of the property and franchises, and on the 18th of September, 1874, effected a

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re-organization of the company under the corporate name of "The Hackensack Water Company, Re-organized."

Before the proceedings in insolvency were commenced, one Alfred W. Craven, now deceased, became the owner of twenty-four of the bonds delivered to Bacot and Ward, by a transfer from the latter; and the complainants, Minna De Kay and Alice C. Palmer, became owners of these twenty-four bonds under the will of the deceased; and, interest being unpaid, they filed this bill of foreclosure against the re-organized company. Bacot and Ward, and the trustee named in the mortgage, were made defendants.

Mr. John Linn, for appellants.

Mr. W. S. Gummere, for respondents.

The opinion of the court was delivered by

DEPUE, J.

This bill was filed for the establishment of the trustee's mortgage for the benefit of all the owners of bonds secured by it. The mortgage was given to the trustee to secure one hundred and thirty-three bonds, aggregating \$66,500. The complainants hold only twenty-four of these bonds, amounting to \$12,000. On account of the number of persons interested in the trust, the trustee might have filed the foreclosure bill in his own name for the benefit of the *cestuis que trust*, without making any of the bondholders parties. *Willink v. Morris Canal*, 3 Gr. Ch. 377; *N. J. Franklinit Co. v. Ames*, 1 Beas. 507; *Shaw v. N. C. R. R. Co.*, 5 Gray 162. A single bondholder, in cases of this sort, will not be permitted in a court of equity to proceed for his demand without bringing in the other bondholders in some form or manner. *Story's Eq. Pl.* §§ 102, 103, 157. The trustee having refused to file a bill of foreclosure, was made a defendant as the representative of the other bondholders. Whether the bill be filed by the trustee named in such a mortgage, or by a holder of some of the bonds, the court will protect the rights of other

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bondholders, although they are not made parties and do not appear in the suit. They may come in and prove their claims before the master, and obtain satisfaction of their demands, equally with the bondholders who are complainants in the suit. *Story's Eq. Pl.* §§ 99, 104 n.; *1 Daniell's Ch. Prac.* 217; *Cockburn v. Thompson*, 16 Ves. 321; *Good v. Blewit*, 19 Id. 336; *2 Jones on Mort.* § 1335. The chancellor properly directed a reference to the master to ascertain the whole amount due on the mortgage.

The receiver sold the mortgaged premises, including the company's franchises, at public sale, in pursuance of an order of sale made June 14th, 1880. Bacot and Ward became the purchasers for \$2,500. They organized the new corporation, and conveyed to it the property and franchises, taking in payment therefor the stock and bonds of the re-organized company. The complainants contend that Bacot and Ward and the new company, which succeeded to their rights in the property, are estopped from contesting the validity of the complainants' mortgage, by reason of the manner in which the receiver's sale was made.

An order might have been obtained directing a sale free from the mortgage, leaving its legality to be determined when the proceeds of the sale came to be disposed of. *Rev. p. 192* § 84. This course was not pursued. The order to sell is in general terms, directing the receiver to make sale by public auction, without any mention of prior liens or encumbrances. A sale under this order would of itself convey the property and franchises subject to the lien of prior encumbrances, just as a sale by a sheriff, of lands under a common law execution, would convey them subject to prior encumbrances, as such encumbrances might be established in the future.

There is a class of cases in which a purchaser, taking title subject to an encumbrance prior in point of time, is precluded from disputing its validity. *De Wolf v. Johnson*, 10 Wheat. 367; *Dolman v. Cook*, 1 McCart. 56; *Conover v. Hobart*, 9 C. E. Gr. 120, are cases of this class. In those cases the lands conveyed were subject to mortgages claimed to be void for usury. In

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De Wolf v. Johnson, the mortgagor had conveyed the premises expressly subject to the mortgage of De Wolf; and in *Dolman v. Cook*, and *Conover v. Hobart*, the mortgagor's conveyances of the mortgaged premises were expressly subject to the mortgages, and it so appeared in the deeds of conveyance. In each of these cases, the grantee, having accepted a conveyance under the mortgagor, subject in express terms to the payment of the usurious mortgage, was held to be estopped from contesting its validity. The theory on which cases of this class are founded is that the mortgagor having elected to affirm the usurious mortgage, by selling the mortgaged premises subject to the mortgage, the purchaser, by his contract as expressed in his deed, took an equity of redemption only, and therefore could not dispute the validity of the mortgage, and thus obtain an interest in the land which the mortgagor never intended to transfer to him. *Shufelt v. Shufelt*, 9 Paige 137; *Post v. Dart*, 8 Id. 639; *Green v. Kemp*, 13 Mass. 515; *Morris v. Floyd*, 5 Barb. 130. But this principle does not apply to sales by officers under judicial process. A purchaser at a sheriff's sale, either under an execution at law against the mortgagor or at the foreclosure sale of a second mortgage, may defend against a prior mortgage on the premises on the ground of usury, although in fact by his purchase he acquired the property subject to whatever prior encumbrances there might be upon it. *Brolasky v. Miller*, 4 Hal. Ch. 789; *S. C.*, 1 Stock. 807; *Pinnell v. Boyd*, 6 Stew. Eq. 600.

The receiver, in his conditions of sale, expressed that the property and franchises would be sold "subject to all legal liens and encumbrances thereon," and so reported his sale to the court of chancery, and by the order of confirmation he was directed to make a deed to the purchasers of the property and franchises, "subject to all legal liens and encumbrances thereon." The receiver's deed to Bacot and Ward contains in its recitals the same language, and conveyed the property to the purchasers, "to have and to hold in as full, ample and beneficial a manner as by authority of law and the orders of the court he could or ought to convey the same." The receiver, in making his sale, exercised a naked power. The order of sale simply directed the receiver

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to sell the company's property and franchises at public sale. A sale in the execution of the power granted by the order would have placed the parties in this position: the purchaser would by law take the property subject to prior liens and encumbrances, with a right, nevertheless, to contest the validity of apparent encumbrances, either with respect to their legal existence or the amount due upon them. An officer selling under judicial process has simply a naked power to sell according to the mandate of the court. He may adopt conditions of sale amply sufficient to secure compliance by the purchaser with his bid, but he cannot impose any liability upon the purchaser with respect to the property sold which would not result by law from his purchase. He cannot, by conditions of sale, change the relations of parties interested in the property, or create any other liability on the part of the purchaser than to complete his contract of purchase. If he undertake to do more, he exceeds his authority and does a nugatory act. A proclamation by the officer that he sells subject to prior encumbrances, and such a recital in his deed, are equivalent to a notice to purchasers of what claims may be made against the title he conveys, and amount to nothing more. *Stevenson v. Black, Sax. 338; Pinnell v. Boyd, 6 Stew. Eq. 600, 602.*

It may also be remarked that the language of the conditions of sale and in the order of confirmation is inapt to exclude the defendants from their defence. It purports to subject the property to legal liens and encumbrances. The defendants defend on the ground that the complainants' mortgage was invalid in its inception, and was not then, and never was, a legal lien or encumbrance.

The complainants also rely upon an estoppel, arising out of transactions occurring at the sale, and at the time when the order of confirmation was made.

It appeared in evidence that the solicitor of the complainants, in the creditors' suit, who was also the legal adviser of the receiver, when he read the conditions of the sale, was inquired of with respect to what liens the property would be subject to, and replied by stating that Bacot and Ward had a judgment, and

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that there was a mortgage—stating the amount—the legality of which was questioned, or in dispute. The person who made this inquiry testified that he understood that the purchaser would take the risk of having this mortgage established as a legal encumbrance. Mr. Hardenburgh, the receiver, testified that his recollection was that it was a sale “as is, you take things as you find them, and reap what profit you can.” He says that his understanding was that the sale was subject to all legal encumbrances—that the purchaser must do the best he could, and that his business was simply to receive the money and divide it among creditors. He adds that he supposed the whole sale was a quit-claim.

This testimony does not warrant the inference that the purchasers in fact agreed at the sale to take the property and subject it to the complainants’ mortgage, whether it was a legal encumbrance or not. The facts are wholly unlike those upon which this court held, in *Warwick v. Dawes*, 11 C. E. Gr. 548, that a purchaser at a judicial sale was estopped. There the purchaser who sought to invalidate a mortgage, bought the mortgaged premises at another foreclosure sale, in the presence of the mortgagee’s solicitor, expressly subject to the mortgage in question, and agreed to pay the amount due on it. By this device he got the property for a price just the amount of the mortgage debt less than he would have got it if he had not agreed to admit that the mortgage was a valid lien. Under these circumstances his endeavor to repudiate the mortgage was a fraud, and was construed to be an estoppel.

It further appeared that Mr. Scudder, the solicitor of the complainants in the creditors’ suit, presented the report of the sale for confirmation; that the vice-chancellor said that the price for which the property and franchises were sold was a grossly inadequate price; that Mr. Scudder thereupon stated that the purchasers had purchased subject to a mortgage, the amount of which he mentioned, and remarked that the purchasers would be fortunate if they got the amount out of the property which they were to pay for it, after payment of the liens to which it was subject, and that, after this statement was made, the vice-chancellor, observing that the order of confirmation recited that the

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property had been sold subject to all legal liens and encumbrances thereon, signed the order of confirmation. How far representations by the complainant's solicitor, in a creditor's bill, made upon obtaining a confirmation of a receiver's sale, are competent to affect the title acquired by the purchasers, even though the purchasers be the same creditors who filed the bill, unless it be upon an application to set aside the sale, need not now be considered; nor need the import or effect of the testimony be discussed. The complainants' bill does not contain any averments on that subject. The answer of Bacot and Ward, which is called for under oath, and is under oath, contains a denial that they in fact became purchasers of the premises, subject to the mortgage unconditionally, and avers that they purchased the property subject to the mortgage, if it should be sustained as a legal and valid encumbrance, and free from such encumbrance if it should be adjudged to be illegal and invalid. If the complainants proposed to exclude such a defence in fact on equitable grounds, arising from what occurred when the sale was confirmed, they should have put the facts on which the estoppel arose directly in issue by express averments in their bill, giving the defendants the benefit of an answer in denial of any assumed authority from them to make any such representations in their behalf.

Nor will the equitable estoppel which might arise in favor of the complainants personally, as against Bacot and Ward, springing from the fact that the latter transferred to the complainants the bonds they hold, answer the purposes of this suit. Of the one hundred and thirty-three bonds secured by the mortgage only forty-eight came to the hands of Bacot and Ward, and they negotiated only the twenty-four which the complainants own. Eighty-five of the bonds were negotiated directly by the company. Bacot and Ward had nothing to do with the negotiation of these, and some of them may be in the hands of *bona fide* holders. A decree in favor of the complainants on any special equity, peculiar and personal to them, will not be in conformity with their bill, nor embrace the merits of this litigation. The complainants' bill was designed to establish the mortgage for the benefit of the bondholders as a class, and a decree in conformity with it should

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establish the mortgage as a valid mortgage for the benefit of all, leaving open for dispute before the master only the title of the bondholders presenting their bonds for allowance, respectively, as *bona fide* holders for value.

The result of this controversy must, therefore, be determined upon the merits of the substantial grounds of defence presented by the defendants' answers. They contend that this mortgage is invalid on two distinct grounds.

In the first place, the defendants insist that the organization of the corporation by which the mortgage was given was not perfected according to the terms and conditions prescribed by law, or by the act of incorporation. The charter provided for an organization and election of directors as soon as \$20,000 of the capital should be subscribed and paid in; and the statute forbids the election of any person as a director who is not at the time a *bona fide* holder of some of the stock of the corporation. *Rev. p. 185 § 47.* The company was organized August 1st, 1873, and directors were elected August 23d, 1873. At that time very little of the stock had been subscribed for and paid in. Indeed, the paid up subscriptions to the stock were never such as to authorize an organization under the act of incorporation; and, although four of the five directors elected had subscribed for stock, none of them had paid his subscription. It is indisputable that the organization was illegal, and that the directors had not the legal qualifications for their offices. But it is also undeniable that there was an organization in form, and that the company became a corporation *de facto*, and its directors officers *de facto*, under color of an organization and of an election. Three of the five corporators named in the act of incorporation participated in the formal organization. Under this organization, such as it was, directors were chosen; a president, secretary and treasurer were appointed by them; a corporate seal was adopted, the corporation purchased and took title for lands in its own name, contracted for the construction of its works, completed its works at the cost of nearly \$100,000, acquired property valued at \$83,000, and contracted debts to an amount in excess of the sum of \$100,000. It must also be borne in mind that the new

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corporation acquired its title to the property and franchises of its predecessor under this organization. In this respect it succeeded the old corporation strictly in a representative capacity; and the debt which was the basis of the proceedings in insolvency, by which the property and franchises of the old corporation were transferred to the new, was a debt contracted under an organization, the legality of which the new corporation now endeavors to impugn.

The general rule of law is that the regularity and validity of the organization of a corporation, effected under color of its charter, cannot be impeached in any collateral proceeding, and that the acts of its officers, who are officers *de facto* under color of an election, are valid and binding upon the corporation. This doctrine has been applied to proceedings to enjoin a corporation from exercising its corporate franchises. *Atty.-Gen. v. Stevens, Sax. 369; National Docks v. Central R. R. Co., 5 Stew. Eq. 755.* It is applied with the utmost liberality in favor of creditors and persons transacting business with the corporation in good faith, relying upon the acts of the corporation and of its officers having an apparent authority to represent it. In *Knight v. The Corporation of Wells, Lutw. 508*, one Day was elected mayor. He was no member of the corporation, and was ineligible. He put the seal of the corporation to a bond. In a suit upon the bond it was objected that Day was not qualified to be mayor, and therefore his acts were void. But it was adjudged that Day, having come to be mayor by color of an election, was mayor *de facto*, and his acts were good. *In re County Assurance Co., L. R. (5 Ch. App.) 288*, by the articles of association of a life insurance company, P. was appointed managing director. The directors who were named in the articles and signed the memorandum of association, refused to act, and passed a resolution that the company should not carry on business or allot shares. Notwithstanding this resolution, P. and one of the shareholders persisted in carrying on the business at the registered office of the company, and allotted shares and appointed directors. A stranger effected a policy at the company's office, which was signed by three of the *de facto* directors, and sealed with what purported

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to be the company's seal. It was held that the policy was binding upon the company, Lord Justice Gifford saying: "I take the law as deduced from the authorities to be plainly this: In the first place, a stranger must be taken to have read the general act under which the company is incorporated, and also the articles of association, but he is not to be taken to have read anything more; and if he knows nothing to the contrary, he has a right to assume, as against the company, that all matters of internal management have been duly complied with. The company is bound by what takes place in the usual course of business with a third party, when that third party deals *bona fide* with persons who may be termed *de facto* directors, and who might, so far as he can tell, be directors *de jure*."

In *Mahony v. East Holyford Mining Co.*, L. R. (7 H. of L.) 869, the memorandum and articles of association of a mining company were registered, and subscriptions for shares were obtained, and paid into bank. The banker received a formal notice, signed by a person who described himself as secretary, to pay checks signed by either of three directors named, and countersigned by himself, in accordance with a "resolution passed this day," a copy of which was enclosed. The banker received and paid checks so signed and countersigned. It afterwards appeared that there never had been a meeting of the shareholders, nor any appointment of directors or of a secretary, but that the persons who had got up the company had treated themselves as directors and secretary, and appropriated the money obtained from the subscriptions. It was held that the banker, having paid out these moneys *bona fide*, was protected in so doing by the instructions under which he acted.

In the second place, the defendants contend that these bonds and the mortgage securing them are invalid, because executed in violation of section 13 of the company's charter. The general rule is, that a private corporation has power to mortgage its property, but not its franchises, as one of its incidental powers, unless prohibited by its charter or by some general statute. The general statute which enables every corporation to mortgage its property and franchises (*Rev. p. 177*) was not in force when this mortgage was made.

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Nix. Dig. 151. Whether a corporation, which has in its charter limited and express powers to mortgage under certain prescribed conditions, has still a general implied power to make a mortgage of its property (*Chambers v. M. & M. R. R. Co.*, 5 B. & S. 588, 607), I do not stop to inquire. The company's franchises are of considerable value, and a sale of them, as well as of the lands mortgaged, will be required to satisfy the mortgage. I will, therefore, consider the case as if the power to mortgage both species of property—the lands and franchises—is identical, and was derived from the company's act of incorporation.

The question presented under this head is independent of the power of the company to contract a debt and give an obligation to pay it on the footing of a simple debt. In some cases such an obligation is validated by the fact that the corporation has had a benefit under the contract, from which may arise an obligation to pay the debt in common with other debts; but where a creditor claims—as the complainants claim—a mortgage security which gives him a lien on property in priority over other creditors, he cannot maintain his security, unless he establishes the validity of his mortgage as an encumbrance which the corporation had power to make.

The section of the charter referred to authorizes the company to borrow money not exceeding two-thirds of the capital stock paid in, and to secure the same by mortgage upon its property and franchises and privileges. The company's capital was fixed at \$50,000, with power to increase it to \$100,000. At the meeting of August 1st, 1873, a resolution to increase the capital to \$100,000 was adopted. The mortgage is for \$66,500, nearly two-thirds of the capital stock as increased. Not over \$2,000 of the capital stock subscribed had then been paid in. The directors made the mortgage and put out the bonds secured by it in plain violation of the charter. The defendants contend that for that reason the mortgage is invalid.

The consideration of this subject is very much simplified by the special circumstances of this case, and is relieved from many of the perplexing doubts and difficulties which have arisen in the English courts with respect to what formalities in the con-

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stating instruments of public companies are imperative, and what directory only, and the exact *status* debentures issued by a public company shall have as negotiable securities. The doctrine of the English courts appears to be that the non-observance of such formalities as are imperative wholly avoids the securities, even in the hands of *bona fide* holders, but such securities, when defective only in such formalities as are merely directory, are binding upon the company as regards persons dealing with it, and not having notice, express or implied, of the imperfection; but it may be said that no definite rule has been established, discriminating between formalities that are imperative and those that are directory. *Green's Brice's Ultra Vires* 509, 515, 519, 532. The difficulties on this subject have arisen from the fact that such securities are not made negotiable by act of parliament; and the earlier cases hold that they are *prima facie* non-negotiable, though the later decisions favor the proposition that they are, in equity at least, negotiable free from the equities primarily attached to them. *Jones on Railroad Securities* § 197; *Green's Brice's Ultra Vires* 257-268; *In re Imperial Land Co., L. R. (11 Eq.)* 478.

In this state, coupon bonds of a corporation, issued under special legislative authority, and designed for the purpose of raising money on a credit, if they contain words of negotiability, are negotiable instruments the same as ordinary commercial paper; and the same immunity from defences in the hands of *bona fide* holders applies to mortgages securing such bonds as to the bonds themselves.

Persons taking securities of this character are chargeable with knowledge of the power to make them as conferred by the charter. If the power granted by the charter is subject to a condition, relating either to the form in which the security shall be made in order to be valid, or to some preliminary proceeding extraneous to the acts of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defences in consequence thereof, even in the hands of *bona fide* holders. Thus, where the statute required such bonds to be certified across their face and to be

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registered, and declared that no bonds should be valid unless so registered, bonds issued without such registry and certificate were held to be void. *Morrison v. Inhabitants of Bernards*, 7 Vr. 219. So, also, where the statute requires, as a preliminary to the issuing of bonds by a county, town or other corporation, that the assent of a certain proportion of voters or taxpayers shall first be obtained, this requisite is essential, and the absence of it will avoid the bonds even as against innocent third parties. *Hudson v. Inhabitants of Winslow*, 6 Vr. 437; *Green's Brice's Ultra Vires* 531, and note.

But this doctrine does not prevail in those instances in which the right to issue such securities is by the charter conditioned upon the performance of acts by the corporation or its officers relating to the management of the affairs of the company. In such cases, as was said by Vice-Chancellor Wood, "if the party contracting with the directors finds the acts to be within the scope of their power under the deed of settlement, he has a right to assume that all such conditions have been complied with." *In re Athenæum Society*, 4 K. & J. 549. In *Royal British Bank v. Turquand*, 6 E. & B. 327, in the registered deed of settlement of a joint stock company, the directors were authorized to borrow on bonds such sums as should from time to time be authorized by a general resolution of the company. A bond, sealed with the common seal, was given by the directors to a banker, without a resolution of the company authorizing it. To a plea setting up that the bond was invalid for the want of an adequate resolution of the company, the plaintiff replied that his bond was signed and sealed by the directors, and that he took it in full faith and belief that it was authorized by and would be a binding security upon the company. The replication was held to be good, and it was adjudged that under the circumstances the obligee had a right to presume that there had been a resolution at a general meeting authorizing the borrowing of money on bond. Chief-Justice Jervis, in delivering the opinion of the Court of Exchequer Chamber, said: "The party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on

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certain conditions. Finding the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." In *In re Comity Life Ins. Co.*, *supra*, it was held that, as in favor of a person dealing with the company in the ordinary course of business, it is sufficient if the contract appears on its face to be consistent with the articles of association and the act of parliament under which it is incorporated; and in *Webb v. Commissioners*, *L. R. (5 Q. B.) 642*, it was adjudged that a body corporate issuing debentures, which were assignable and purported to have been issued pursuant to powers conferred by statute, is estopped from alleging against innocent assignees for value that the debentures were issued illegally and in contravention of the statutory powers. *Agar v. Life Ass. Co.*, *3 C. B. (N. S.) 725*; *Prince of Wales Ass. Co. v. Harding, E. B. & E.* *183*; *In re Land Credit Co.*, *L. R. (4 Ch. App.) 460*; *In re Gen. Prov. Ass. Co.*, *L. R. (14 Eq.) 507*; *In re Gen. S. Amer. Co.*, *L. R. (2 Ch. Div.) 337*; *In re Int. Pulp Co.*, *L. R. (6 Ch. Div.) 556*, are also expositions of this principle, and practical illustrations of its application to securities irregularly made by the directors of a corporation, and in the hands of *bona fide* holders.

In the cases cited, the obligations in question were those of companies organized under acts of parliament which provided a plan of incorporating those companies with special powers and liabilities, and such additional powers and restrictions as might be expressed in the articles of association or deed of settlement providing for the manner in which the business should be managed and conducted. These articles of association and deeds of settlement were required to be made a public record, and a company incorporated under these statutes is in the position of a corporation under a charter containing special and limited powers. Persons dealing with such companies are, as was said by Lord Hatherly, affected with notice of all that is contained in the statute and the articles of association; but with regard to all that the directors do with reference to what he calls "the indoor management of their concern," that is a thing known to them and

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to them only, and persons dealing externally with those managing the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, are not to be affected by any irregularities which take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, is rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. *Mahony v. East Holyford Mining Co.*, L. R. (7 H. of L.) 893, 894.

In *Chambers v. M. & M. Railway Co.*, 5 B. & S. 588, a railway company was empowered by its special act to raise a capital of £555,000, and to raise by mortgage any further sum not exceeding £185,000; but no part of such further sum was to be raised until the whole of the capital had been subscribed for and one-half paid up. Part only of the capital was subscribed for. The company, being in want of money, borrowed £10,000, and sealed and issued Lloyd's bonds as security for the amount. The court held that the bonds were invalid, inasmuch as the borrowing power of the company was limited by the foregoing provision in its charter, and the company's defence to an action on one of these bonds was sustained; but the judgment of the court was distinctly put upon the ground that the plaintiff was chairman of the company, and had knowledge of the purpose for which the bonds were made, and was a party to the resolutions by which the secretary was authorized to seal them. Indeed, as is apparent from all the cases cited, the doctrine which validates securities within the apparent powers of the corporation, but improperly and therefore illegally issued, applies only in favor of *bona fide* holders for value. A person who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled, is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a *bona fide* holder of the same security. In *re Magdalena Steam Nav. Co.*, 6 Jur. (N. S.) 975; *Woodhams v. Anglo-Australian Co.*, 8 Jur. (N. S.) 148; *In re South Essex Gas*

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Light Co., Id. 357; *In re Patent Bread Mach. Co., L. R.* (7 Ch. App.) 289; *In re General Provident Ass. Co., L. R.* (14 Eq.) 507; *In re Hercules Ins. Co., L. R.* (19 Eq.) 302, 310; *In re International Pulp Co., L. R.* (6 Ch. Div.) 556, 560; *In re Native Iron Ore Co., L. R.* (2 Ch. Div.) 345; *In re S. Amer. Co., Id.* 337. In *Leggett v. N. J. M. & Banking Co., Sax.* 541, the corporation was a banking company, with no power to mortgage, except such as is incidentally possessed by a corporation; and the charter provided that all its affairs, property and concerns should be managed by a board of directors. The president and cashier, without being authorized by the directors, executed a mortgage in the corporate name and under the corporate seal, upon the banking-house, to Leggett and Burtis, in trust for the Franklin Bank, to secure an existing debt. Leggett, one of the trustees, was president of the Franklin Bank, and he knew that the president and cashier of the mortgagor made the mortgage without any authority from the directors. The company had no statutory power to make mortgages as negotiable securities, and the trustee and the *cestui que trust* accepted the mortgage with full knowledge that it was illegally made. The mortgage was not, in a legal acceptance, a negotiable security, nor was the mortgagee a *bona fide* holder. Though the debt remained, the mortgage was declared invalid.

The decisions in the English courts referred to were, in the main, made with respect to securities irregularly issued, for the want of proper resolutions by the shareholders authorizing them. But the principle established, distinguishing between limitations and conditions in the statute and articles of association—external matters of which the public has notice by the public record, and acts to be done by the corporation or its officers as conditions precedent to the making of such securities in the internal affairs of the company—is applicable to every sort of infirmity to which such securities may be subject. In the courts of this country it may also be considered as settled law that, except where the statute empowering a corporation to make securities designed to be negotiable, prescribes as a condition that they shall be issued with certain formalities to be observed, as in *Morrison v. Township of Bernards*, or prescribes as a condi-

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tion to the power the approval of the voters at an election, as in *Hudson v. The Inhabitants of Winslow* (events external to the business of the corporation, the concurrence of which may be easily ascertained), where the corporation has power, under any circumstances, to issue negotiable securities, a *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority; and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *City of Lexington v. Butler*, 14 Wall. 282; 2 Dan. Neg. Inst. §§ 1487, 1500; *Boyd v. Kennedy*, 9 Vr. 146; *Mayor of Jersey City v. Copper*, 15 Vr. 634.

In the present case the company was authorized to increase its capital to the sum of \$100,000. A resolution to effect the increase was in fact adopted. By its charter it was empowered to issue bonds and secure them by a mortgage of its property and franchises to an amount not exceeding two-thirds of its capital paid in. These securities it was authorized to make for the purpose of borrowing money, a purpose which could be promoted only by making such securities negotiable, and thereby adapted to be placed in the market. The bonds issued amounted to the sum of \$66,500, and were within the limit of two-thirds of its possible capital. The bonds were payable to the trustee or bearer, with interest coupons attached, sealed with the corporate seal; and in each bond was a recital that it was one of a series of like amount, tenor and date, amounting to \$66,500, all secured by a mortgage on the lands, property, privileges, chartered rights and franchises of the company, duly executed and delivered by the company. The mortgage purported to be sealed with the seal of the corporation and signed by its president and secretary, and was accompanied by proof by the oath of the secretary, in due form of law, that the seal affixed thereto was the corporate seal of the corporation, and was so affixed by authority of said corporation pursuant to a resolution passed at a regular meeting of the board of directors.

The mortgage was within the power granted to the corporation by its charter, and on its face had every appearance of hav-

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ing been made and executed strictly in conformity with the power of the company to mortgage its property and franchises. It was illegally made and executed only for the reason that the directors violated their duty in making the mortgage and the bonds, and putting the bonds in circulation without first obtaining subscriptions to the capital, to be made and paid up, sufficient in amount to justify them in making the mortgage. The stock ledger of the company, the amount of subscriptions to its stock, and to what extent the same were paid in, were matters relating to the company's internal affairs, and exclusively within the cognizance of its officers and stockholders, into the condition of which no stranger had a right to inquire. In all the external circumstances—competent legislative authority, an organization *de facto*, directors and officers *de facto*, the corporate seal affixed, with the secretary's oath that it was legally affixed—the transaction was perfectly legal. These are the matters which persons dealing in corporate securities are bound to take notice of. The imperfection arose from the omission of acts which the directors should have done in the management of the private business of the company. Those are the matters with respect to which third persons are not obliged to be informed. Finding the power to make the mortgage in the charter, and that the power might be made complete on certain conditions to be performed by the corporation in the management of its internal affairs, third persons would be justified in assuming that such conditions had been complied with, and that everything had been done by the corporation or its directors which was necessary to validate the securities before they were put in circulation. As against a *bona fide* holder, who has taken upon the faith that the security is what it appears to be, a corporation cannot defend on the ground of such omissions on its part or by its directors.

The complainants took their bonds without any knowledge of the mode in which the corporation was organized, or of the condition of the company's subscription to its capital when the mortgage was made. They are admitted to be *bona fide* holders, and are entitled to have the mortgage established and payment of their bonds decreed out of the mortgaged premises. Whether

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the holders of the residue of the bonds are entitled to the same right, as being *bona fide* holders, must be determined before the master in taking the account.

The decree, establishing the mortgage and directing an account, should be affirmed.

Decree unanimously affirmed.

WILLIAM CLEMENTS, appellant,

v.

SILAS H. JESSUP, respondent.

1. An officer having process of execution or attachment against one partner may seize the latter's interest in partnership property; but a purchaser at a sale under such process will acquire only the interest of the partner in the partnership property, after the firm debts are paid and the affairs of the partnership are adjusted.

2. The capital of a partnership, *ex necessitate rei*, is the property of the firm, and goods and chattels, the property of one of the partners, put in by him as part of the capital he agreed to contribute to the partnership, become partnership property, and as such are liable for the payment of the firm debts in priority over the debts of the individual partner whose property they formerly were.

3. A and B became partners under articles of partnership, to continue for four years—A to provide the capital, and B to contribute his labor and services. As part of the capital, A put in certain goods and chattels he owned individually such as were necessary in the firm's business. After the firm commenced business, and the goods and chattels in question had been put in, an attachment issued against A for an individual debt.—*Held*, that a chattel mortgage upon the same property, made by both partners for a firm's debt, had priority over the title of a purchaser at a sale of them under the attachment, although the attachment was prior in time to the chattel mortgage.

On appeal from a decree advised by Vice-Chancellor Dodd.

Martin Shea and Constandt Schnorr became partners in the business of brewing, by articles of partnership dated November 16th, 1876—the partnership to continue four years from that

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date, unless sooner dissolved by death or by mutual consent. On April 15th, 1878, a writ of attachment was issued out of the circuit court against Shea as a non-resident debtor, and was executed by attaching his right, title and interest in all the goods and chattels used in the partnership business of Shea & Schnorr. The debt for which the attachment was issued was Shea's individual debt. Judgment by default was entered, under which the auditor in the attachment sold all the right, title and interest of Shea in the goods and chattels attached to Clements, the appellant, for \$779.

Shea & Schnorr, being indebted in \$2,200 to Jessup, the respondent, for goods sold and money lent to the firm, on the 19th of June, 1878, gave to him a chattel mortgage to secure that indebtedness upon the same goods and chattels which had been attached. On the 15th of August, 1878, Schnorr filed a bill for the dissolution of the firm and an account of the partnership affairs. Clements and Jessup were made parties to this bill. A receiver was appointed, the property sold and the net proceeds of the sale, amounting to \$895.13, have been paid into court. The vice-chancellor ordered this money to be paid to Jessup. From this order Clements appealed.

The goods and chattels seized under the writ of attachment, and also included in the chattel mortgage, were the individual property of Shea before the partnership was formed. They consisted of pumps, casks, barrels, horses and wagons, and other articles suitable for carrying on the brewing business. They were in and about the brewery and in use for the business when the attachment was served and the chattel mortgage given.

The articles of partnership provided that the capital stock of the copartnership should be \$5,000, "the whole of which has been contributed" by Shea. "The said capital stock is to be used and employed in common between the partners for the support and management of said business to their mutual benefit and advantage;" Schnorr "to contribute to the business his knowledge, skill and ability in the art of brewing, and to devote all his time and attention for the joint interest, profit, benefit and advantage of the firm;" the profits arising from the business to

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be divided equally, and each partner to share in the losses happening in the joint business. The articles of partnership provided for an increase of capital by leaving in the business part of the annual profits, in which event each party was to contribute to the increase equally; and also for an equal division of the stock and profits on the determination of the partnership, except that if the capital should not be increased it should all be paid to Shea, and only the increase of the capital should be divided equally between the partners. It appeared in the case that the partnership property was not increased by profits or otherwise, but remained the same as when the business was commenced.

Mr. Charles F. Hill, for appellant.

Mr. Henry F. Goken and *Mr. John V. Kernan*, for respondent.

The opinion of the court was delivered by

DEPUE, J.

The controversy is between Clements, a creditor of the firm holding a chattel mortgage executed by both partners for a firm debt, and Jessup, the purchaser at a sale under an attachment against one of the partners for an individual debt, the attachment being prior to the chattel mortgage in point of time.

The interest of a partner in partnership property is only his share on a division of the surplus, after payment of partnership debts; and partnership property must be applied first to the payment of firm debts. *3 Kent 37; Cammack v. Johnson, 1 Gr. Ch. 163; Matlack v. James, 2 Beas. 126.* A purchaser directly from a partner of his interest in the firm property acquires no title in partnership property except the vendor's share in the surplus after an accounting and adjustment of the partnership affairs. *Tarbell v. West, 86 N. Y. 280; Hill v. Beach, 1 Beas. 31; Cavander v. Bulteel, L. R. (9 Ch. App.) 79.* A sheriff having process of execution or attachment against one partner may seize and sell the latter's interest in partnership property; but a sale under such process will convey only the interest of the partner in partnership property after the firm debts are paid and the affairs

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of the partnership are settled up. *Brown v. Bissot*, 1 Zab. 46; *James v. Burnett*, Spen. 635; *Linford v. Lent*, 4 Dutch. 113; *Atwood v. Impson*, 5 C. E. Gr. 150; *Johnson v. Evans*, 7 Man. & G. 240; *Garbett v. Veale*, 5 Q. B. 408. Indeed, partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent and had sufficient property remaining to pay the partnership debts. *Menagh v. Whitwell*, 52 N. Y. 146; *Wilson v. Robertson*, 21 Id. 587; *Ex parte Snowball*, L. R. (7 Ch. App.) 534; 2 Lind. on Part. 658. The appellant, by his purchase at the sale under the attachment against Shea, acquired, by virtue of the levy and sale under that proceeding, only the interest of Shea in the property, and the receiver's report shows that this property is required to pay the debts of the firm. In either aspect of the case, Jessup, as a partnership creditor, holding a chattel mortgage on the same property, executed by both partners for a firm debt, is entitled to priority, though his mortgage is subsequent in date to the attachment, if the property attached and sold was in fact partnership property.

The goods and chattels with respect to which this controversy has arisen, were the individual property of Shea before the partnership was formed. The contention is that they continued to be Shea's individual property during the partnership, and that the firm had no property in them or control over them except for use in the course of the partnership business.

Sometimes it happens that property which is in individual ownership is used for partnership purposes or in a joint adventure upon a community of profits, and it remains the sole property of the individual owner during the continuance of the partnership. In other words, there may be a partnership in the profits or in the business, and none in the property with which it is carried on. 2 Lind. on Part. 648, 649; *Parsons on Part. 48*. This condition of affairs arises generally where the property consists of lands used for partnership purposes, and less fre-

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quently with respect to chattels, such as office furniture or utensils of trade actually used by the firm. *Ex parte Owen*, 15 Jur. 983; *Ex parte Smith*, 3 Madd. 63. Cases of this description give rise to questions of considerable nicety, especially where the property consists of chattels necessary for use in the firm business, and the claims of partnership creditors are in the issue. This case, however, is free from all difficulty in that respect, for if one partner brings such property into the common stock as part of his contribution to the capital, it becomes partnership property. 2 Lind. on Part. 649; *Robinson v. Ashton*, L. R. (20 Eq.) 25; *Cavander v. Bulteel*, L. R. (9 Ch. App.) 79; *Ex parte Morley*, L. R. (8 Ch. App.) 1026.

By the articles of partnership, Shea agreed to furnish all the capital stock to be used in the partnership business, Schnorr contributing only his personal services. The capital to be furnished by Shea was fixed at the sum of \$5,000. Instead of advancing the money to buy the horses, wagons and implements necessary for the business, Shea provided them from stock which he had on hand. It does not appear that any credit for these articles as capital furnished by Shea was made in the firm book. But that circumstance is of little importance, inasmuch as Shea was to provide all the capital, unless there should be an increase of capital, as stipulated for in the articles of partnership, and, therefore, there was no need of an account to be kept of the contributions of the partners to the capital, in the situation the business was in. It is manifest from the kind of property, the use made of it for partnership purposes, the need of property of that description to be bought with money or provided otherwise, and the manner in which it was treated by the partners, that the chattels in controversy were considered as part of Shea's contribution to the capital, as much so as if he had furnished money out of pocket to purchase them. *Ex necessitate rei*, the capital of a partnership, like the capital of a corporation, becomes firm property though it was once the property of an individual partner, and was put in *in specie*, and as such is liable to the payment of firm debts in priority over the debts of the individual partner, whose property it formerly was. Having become part-

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nership property, it could not be taken out of the firm under any agreement to that effect relative to the dissolution, until the partnership debts were paid. *Ex parte Morley*, L. R. (8 Ch. App.) 1026; *Ex parte Dear*, (1 Ch. Div.) 514.

The decree should be affirmed.

Decree unanimously affirmed

HENRY J. CODDINGTON, appellant,

v.

THE EXECUTORS OF CHARLES BISPHAM, respondents.

1. A mortgagee has no right, as mortgagee, to the rents of the mortgaged premises which have been paid into the court of chancery by a receiver appointed in a suit by legatees for the administration of the estate of the mortgagor, although the mortgagee has obtained a decree for the foreclosure of his mortgage in the same court, and has sold the mortgaged premises and part of the debt is unsatisfied. He should have applied to discharge the receiver in the administration suit, and entered into possession himself, or applied for a receiver in his foreclosure suit.

2. Rent collected by the receiver in an administration suit becomes part of the assets to be administered under the direction of the court, and the only right of the mortgagees of the premises for which rent has been collected by the receiver is, if he holds an obligation of the deceased, to come in as a creditor in common with other creditors.

3. Whenever a bill is filed in equity against executors, either by a creditor or by residuary or other legatees, touching the administration of the estate, the suit is for the benefit of all persons interested as creditors and legatees, and the court may assume the general administration of the estate and make a final disposition of the assets.

4. In the administration of estates of decedents in the court of chancery, the assets will be applied as they would be applied in the probate court. Creditors will be allowed priority over legatees, who will take nothing until the debts are paid.

5. Lands being assets for the payment of debts, rents accruing pending a suit in chancery for the administration of the estate and collected by a receiver appointed in that suit, are also assets to be applied in payment of debts.

6. The jurisdiction of chancery over suits for the administration of the

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assets of decedents, concurrent with the probate courts, with the power to have an account taken of the assets and debts and liabilities of the deceased, and to make distribution of the residue after debts are paid, is part of the ancient and inherent jurisdiction of courts of equity.

7. The power of the court of chancery in administration suits to ascertain by its own peculiar methods the amount of the debt due to the obligee on a bond made by the deceased and secured by a mortgage, is entirely independent of section 76 of the chancery act, relating to decrees for deficiency in foreclosure suits, and is not affected by the repeal of that section by the act of 1880.

8. The act of 1881 (*P. L. of 1881 p. 184*), which provides that where a debt is secured by a bond and mortgage the first proceeding to collect the debt shall be by the foreclosure of the mortgage, and that the foreclosure and sale of the mortgaged premises shall be opened and the property be subject to redemption on payment of the decree, in case a judgment shall, after the foreclosure and sale, be recovered on the bond for the balance of the debt, is unconstitutional as applied to antecedent obligations.

On appeal from an order advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Coddington v. Bispham*, 9 *Stew. Eq.* 224.

Smith Coddington died on the 11th of May, 1868. By his will he appointed Walter Brewster and John C. Coddington executors. Besides personal estate, the deceased was seized of a house and lot in Rahway. The testator bequeathed pecuniary legacies to several of his children, and charged the payment thereof on his lands in case of a deficiency of his personal estate to pay the same. The residue he gave to his children in equal shares.

In 1879, three of the legatees filed a bill against the executors, charging maladministration of their trusts—praying an account of the debts and funeral expenses of the deceased, and of his personal estate and the rents and profits of the real estate—for a receiver to collect the rents, and a decree to have their shares paid them.

On November 24th, 1879, Jacob R. Shotwell was, in compliance with the prayer of the bill, appointed receiver of the rents of the Rahway house and lot.

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On October 24th, 1881, a decree for an account was taken, but no further steps have been taken in the cause.

The executors of Charles Bispham, deceased, held a mortgage on the Rahway property, made by Smith Coddington, the testator, in his lifetime, dated February 25th, 1863.

On March 23d, 1881, Bispham's executors filed a bill to foreclose the mortgage, and March 20th, 1882, obtained a decree of foreclosure and sale. The property was sold under the decree June 28th, 1882, and a balance of \$1,200 of the mortgage debt was left unpaid, for which the executors hold Smith Coddington's bond.

Shotwell, the receiver, filed a report July 12th, 1882, stating that he had received the rent of the house and lot from April 1st, 1880, to April 1st, 1882, and showing a balance in his hands of \$337.85, after paying expenses.

The executors of Bispham filed a petition asking that the sum of \$337.85 should be applied in payment of the debt remaining due on the bond.

It was admitted that the expenses of the administration and all the testator's debts, except the balance due on the bond, had been paid, and that the only persons who have any right to the balance in the receiver's hands are the executors of Bispham and the legatees under the will.

The vice-chancellor granted the prayer of the petition, and ordered the money paid over on the bond. From this order Henry J. Coddington, one of the complainants, appealed.

Mr. H. K. Coddington, for appellant.

Mr. R. E. Chetwood, for respondents.

The opinion of the court was delivered by

DEPUE, J.

This case was heard in the court of chancery very informally, by consent of parties. The substantial controversy there was, whether creditors or legatees under the will of the deceased

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had priority of payment out of the fund paid into court by the receiver.

As mortgagees, the executors of Bispham are not entitled to this fund on the ground that they were suitors in the court of chancery for the foreclosure of the mortgage. The receiver was appointed in another suit. A receiver appointed in a suit is appointed for the benefit of such of the parties in that suit as afterwards appear to be entitled to the fund in controversy, but not for the benefit of strangers to the suit. *Thomas v. Brigstocke*, 4 Russ. 64; *Howell v. Ripley*, 10 Paige 43; *Post v. Dorr*, 4 Edw. Ch. 412; *In re Ingraham*, 2 Barb. Ch. 35. A mortgagee has no title to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding he may, after the receiver's appointment, have given notice to the tenants to pay the rents to him. He should have followed up the notice by applying to discharge the receiver, and then entered into possession himself, or filed his bill and applied for a receiver in his own suit. *Thomas v. Brigstocke*, *supra*; 2 Jones on Mort. § 1524. He cannot in this way obtain priority over other creditors whose debts would be of equal degree with the mortgage debt in the general administration of the estate. A court of equity will always, in the administration of assets, place all the creditors on an equality as far as possibly can be done without disturbing existing liens. *State Bank v. Receivers*, 2 Gr. Ch. 266. The executors can make claim to the fund only as creditors, and on the ground that the moneys are assets for the payment of debts.

The legatees might have taken proceedings to obtain the account in the orphans court, but the court of chancery having jurisdiction over the accounting of executors concurrent with the orphans court, the legatees filed a bill for an account in that court. The selection of the court of chancery as the forum of the litigation did not affect the relative rights of creditors and legatees in the assets of the estate. On a bill filed for an account, the equity court may take the account and retain jurisdiction over the subject until the entire litigation is ended, and may

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make a distribution of the assets among the persons entitled. Whenever a bill is filed in equity against executors, either by a creditor or by residuary or other legatees, touching the administration of the estate, the suit is for the benefit of all parties interested, and the court may assume the general administration of the estate. *Ram on Assets*, 294, 298; *1 Story's Eq. Jur.* § 543 a; *Brooks v. Reynolds*, 1 Bro. C. C. 183; *Drewry v. Thacker*, 3 Swanst. 529; *Clarke v. Earl of Ormonde*, Jac. 108, 111, 121; 3 Wms. on Exrs. 2034; *Brooks v. Gibbons*, 4 Paige 374; *Salter v. Williamson*, 1 Gr. Ch. 480, 490; *Van Mater v. Sickler*, 1 Stock. 483, 485; *Clark v. Johnson*, 2 Id. 287.

The theory on which a court of equity in such cases proceeds to a final account and the administration of the estate is, that the court, having obtained jurisdiction, will retain the subject-matter until a final accounting, and until a distribution of the assets is made. *1 Story's Eq. Jur.* § 533 a, 536; *Wager v. Wager*, 89 N. Y. 161; *Youmans v. Youmans*, 11 C. E. Gr. 149. In the course of such an administration in the court of chancery, the assets will be applied as they would be applied in the probate courts, and creditors will be allowed priority over legatees even when the assets are equitable assets, and legatees will take nothing until the debts are paid. *1 Story's Eq. Jur.* § 555.

The debt due to Bispham was secured by a bond made by Coddington in his lifetime, as well as by the mortgage. Part of it had been paid out of the proceeds of the foreclosure sale; the balance was a subsisting debt, to be paid out of the assets of the estate of the obligor. As creditors in virtue of the bond made by the deceased, the executors of Bispham were parties to the complainants' suit, which drew into the court of chancery the entire administration of the assets, and was a suit for the benefit of all persons interested either as creditors or legatees.

In *Mallory's Admr. v. Craige*, 2 McCart. 73, Craig died leaving no personal estate for the payment of debts, and seized of a lot of land in the city of Newark. After his death the lot was taken by the city for a street, and the appraised value paid to the city treasurer. On a bill filed by Mallory, a creditor of the deceased, to have his debt paid out of this fund, Chancellor Green

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held that the proceeds of the lands in the city treasurer's hands were assets for the payment of debts. He stated that the general practice in such cases was not to send the parties to the orphans court for a final settlement, and that ordinarily, when the parties were before the court, the final account was settled in chancery; and the fund being small, and in his opinion justice being more speedily attained by having the final account taken in the court of chancery, the chancellor directed a reference to a master to take an account of the debts and credits of the estate, giving creditors reasonable notice to come in and prove their debts.

The lands whereof the testator died seized being assets for the payment of debts, and the court having taken charge of all the assets, real and personal, for the purpose of administration, rents realized while the lands were in the custody of the court in the process of administration are assets for the payment of debts equally with the lands themselves.

The legatees contend that the creditors should have been remitted to other assets in the hands of the executors. But the legatees suffered their suit to rest with a decree for an accounting, and it is undetermined whether anything shall be found due from the executors, and whether they have the ability to pay. As between creditors, who are entitled to be paid first, and legatees, who take only the surplus after debts are paid, the equity is wholly in favor of the former, to have the assets in hand applied in satisfaction of their demands.

Objection was made on the ground that the vice-chancellor ascertained the amount of this debt. The bond was secured by a mortgage, and the 76th section of the chancery act (*Rev. p. 118*), relating to decrees for deficiency in foreclosure suits, having been repealed by the act of 1880 (*P. L. of 1880 p. 255*), it was insisted that chancery had no power in any way to ascertain the amount of the debt due on this bond. But the jurisdiction of the court of chancery to superintend the administration of assets and decree a distribution of the residue after payment of all debts and charges, concurrent with the probate courts, is part of its jurisdiction, established as early as Charles

Coddington v. Bispham.

II. 1 *Story's Eq. Jur.* §542; *Clark v. Johnson*, 2 *Stock.* 287. And the power of the court in taking an account before a master to ascertain the debts and liabilities of the estate is also ancient and equally well settled. Its jurisdiction in that respect is entirely independent of the section of the chancery act referred to.

The orderly course of practice would have been by a reference to a master to take an account of the assets and of all the debts of the deceased. But this course was dispensed with at the solicitation of the parties, who admitted that this was the only debt unpaid, and, waiving all formalities, desired only an opinion whether, in the due course of the administration of the fund in question, it should be paid to the creditors or to the legatees. The prayer of the complainants' bill is that an account should be taken of the debts and funeral expenses of the deceased, and that payment be made to the complainants of their respective shares. Until the debts were ascertained and paid, the relief prayed could not be granted. In form and substance the bill is a bill for the general administration of the estate.

It was further insisted that the creditor should have been put to an action at law upon the bond, to the end that the foreclosure and sale of the mortgaged premises might be opened by any judgment recovered for the balance of the debt due on the bond, pursuant to the 3d section of the act of 1881. *P. L. of 1881 p. 185.* The creditor's bond was made February 25th, 1863. The act of 1881 impaired the value of the mortgage security by subjecting the purchaser's title to conditions of redemption which did not exist when the contract was made, and thereby diminished the vendible value of the mortgaged premises. As applied to antecedent obligations, the act of 1881 is unconstitutional and void as impairing the obligation of contracts. *Baldwin v. Flagg*, 14 *Vr.* 495-504.

The decree should be affirmed.

Decree unanimously affirmed.

NOTE.—See *Kring v. State*, U. S. Sup. Ct., April, 1883; *Miller*, J. 27 *Alb L. J.* 347, 351, 16 *Cent. L. J.* 308, 312.—*REP.*

Lee v. School Trustees.

IRVING LEE et al., appellants

v.

THE TRUSTEES OF SCHOOL DISTRICT No. 1, IN THE
COUNTY OF ATLANTIC, respondents.

1. The common council of Atlantic City have no power to order money to be raised by taxation for the erection of school-houses. It requires a majority vote of the assembled inhabitants of the school district for that purpose.

2. Money raised under authority of the thirty-first section of the charter of Atlantic City (*P. L. of 1866 p. 330*) for school purposes, cannot be applied by the school trustees to the erection of school-houses.

On appeal from an order dismissing an order to show cause why an injunction should not issue, advised by Vice-Chancellor Bird.

Mr. C. G. Garrison, for appellants.

Mr. D. J. Pancoast, for respondents.

The opinion of the court was delivered by

VAN SYCKEL, J.

The question in this case is whether the defendants have the right to appropriate moneys in their hands to erect a school-house, no authority having been given to them for that purpose, either by the voters of the said school district, or by the common council of Atlantic City.

The money which the trustees propose thus to apply is an unexpended balance in their hands, derived from its quota of the state fund, and from taxes imposed for school purposes by virtue of the 31st section of the city charter. *P. L. of 1866 p. 330*.

The charter of Atlantic City passed in 1866 provides for the election of three school trustees, without defining their power or duty.

The general school law of 1846, supplemented by the act of March 14th, 1851 (*Nix. Dig. 738*), then in force, expressly defined

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the powers of school trustees. The defendants, therefore, in their official capacity, can exercise no authority in excess of that bestowed by the general school law, unless a grant for it can be found in the special legislation applicable to the municipal corporation within the limits of which they act.

Under the general law of 1851, the trustees could not appropriate moneys to the purchase of lands or the erection of a school-house without the vote of two-thirds of the assembled inhabitants of the district. This law remains unchanged except that a majority vote of the inhabitants now gives the requisite authority for such appropriation.

The seventh section of the school law of 1851 made it the duty of school trustees to apply all moneys appropriated to their district, or raised therein by taxation or otherwise, to the establishment and maintenance of free schools in such district, except only such part thereof as should be otherwise applied by virtue of the provisions in said law contained. Section 11 of the same act then authorizes the construction of school-houses by a two-thirds vote of the inhabitants.

Under the law of 1846 (section 9), it was the duty of school trustees to provide a suitable room where school could be taught, but no express power was given to raise money by tax to build school-houses or buy land therefor. That was a special authority, conferred by the general law of 1851 to be exercised only in the designated way.

Such was the law of this state when Atlantic City was chartered, and it has not been materially modified by our general legislation, so far as the question here involved is concerned. That law must operate as a restraint upon the authority of the defendants unless they are relieved from it by the provisions of the city charter.

Section 31 of the city charter of 1866, provides:

“That said city council may direct to be raised, by taxation, for school purposes, any sum not exceeding \$10 per head for every child in said city between the ages of five years and twenty-one; and that the said city shall be entitled to its just proportion of the annual appropriation of the school fund of this state, and to its just proportion and quota of the interest on the surplus revenue

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apportioned to and received by the state of New Jersey, which money shall be paid over immediately to the treasurer of the trustees of common schools for the time being, and be applied to school purposes in said city."

The school law of 1851 (section 6) authorized the inhabitants of the several townships at their annual town meetings to raise, by tax or otherwise, in addition to the amount apportioned to their use, such further sum of money as they might deem proper for the support of public schools, not exceeding \$3 for each child.

Section 7 directs that the money so raised shall be used for the establishment and maintenance of free schools. That it cannot be applied to the erection of school buildings is clearly shown by reference to section 11, which confers upon the inhabitants of school districts the exclusive right to raise money for that purpose.

Section 31 of the city charter of 1866 granted to the common council the same power to direct money to be raised for school purposes that was given to the inhabitants of the townships by section 6 of the general law of 1851, limiting the sum to be raised to \$10 per scholar instead of \$3.

In both instances the money voted is mingled with the moneys derived from the state fund, the limit being enlarged to \$10 per scholar in the city charter to make the schools free for the whole or greater portion of the year. These provisions so similar in their character manifestly had a common object, and should receive a like interpretation. Under the school law of 1851 the inhabitants of the township, in their meeting assembled, could not, under section 6, or by force of any other provision in the law, vote moneys for the erection of school-houses. The right to make such appropriation could be exercised only by the inhabitants of the school district under section 11. Such further authority has not been bestowed upon the common council of Atlantic City, and it must, therefore, be presumed to have been withheld.

Money voted under the thirty-first section of the city charter, like money raised under the sixth section of the school law of 1851, is a sum authorized to be assessed annually, to be applied

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to annual current expenses. It cannot be diverted to those extraordinary purposes which are objects of occasional appropriations made under section 11 of the general law of 1851. In regard to these extraordinary outlays, there is nothing in this legislation which indicates a purpose to deprive the inhabitants of the school district, upon whom the burden falls, of the benefit of the statutory provision that they shall not be incurred unless authorized by a majority vote of such inhabitants.

The power in this respect is lodged in the inhabitants of the school district.

Under the general law of 1851 it was necessary to specify what sum was to be levied to erect buildings or purchase land, and the fund, when raised, could not be diverted, nor could the expenditure be in excess of it. This provision has been retained in the school law and has been strictly enforced by judicial decision. No power is conferred by the city charter upon the common council to apportion the school moneys between the different objects for which money may be raised, under the eleventh section of the law of 1851, or under the corresponding section of the school law now in force. The absence of such provision is a strong indication that the money was to be used exclusively for current expenses, and hence authority to apportion was unnecessary.

The supplement to the city charter, passed in 1872 (*P. L. of 1872 p. 590*) does not amplify the power of the school trustees to such an extent as to justify them in appropriating school moneys to any object other than that for which they are raised. They are vested with no power to apportion school moneys.

Section 2 of the said supplement provides that the school superintendent of said city shall be the school treasurer thereof, and receive from the tax collector all moneys collected by him for school purposes, and from the treasurer of Atlantic City all moneys he may receive for school purposes by virtue of any law of this state.

Section 3 enacts that the school treasurer shall pay out no moneys by him received for school purposes except upon a written order of the trustees of said city, or a majority of them, which order shall state the purpose for which it is given, and be

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made payable to the person entitled to receive the money, and be by him or her endorsed.

The trustees here claim that this third section vests in them the power in their discretion to apportion the moneys in the school treasurer's hands to any of the purposes for which money may lawfully be raised under the general school law of the state. As has been shown, the common council are without the power to order money to be raised by tax for school-houses; moneys for that object must be raised as required by the school law. Therefore the authority asserted to exist in the trustees, implies the right to divert money from a use for which it has been expressly ordered by a vote of the inhabitants.

There is no language in this legislation which will bear such an interpretation. The statute does not say that the moneys received by the treasurer for school purposes shall be paid out for such uses as shall be authorized by the trustees; but they shall be paid out on the written order of the trustees, which order shall state the purpose for which it is given. The object of requiring the order to state the purpose is not to enable the trustees to divert the fund to an object different from that for which it is raised, but, on the contrary, to prevent them from doing so. Their order stating the purpose for which it is given, and the required endorsement thereof by the person to whom it is made payable, will at all times show whether the trustees have been guilty of misappropriation. This was intended to be a check upon, not an enlargement of their authority.

The act of March 31st, 1882, entitled "an act to enable cities to provide additional school accommodations where the same are necessary, and to borrow money for the purpose," does not apply to this case.

That act authorizes the borrowing of money for the purpose of erecting school-houses in certain cases. This is not a question of the power to borrow money, but an attempt to use money in hand for a purpose to which it is not legally applicable. In my judgment, the school trustees are without the authority which they claim to exercise, and they should be enjoined. The decree below should be reversed.

Decree unanimously reversed.

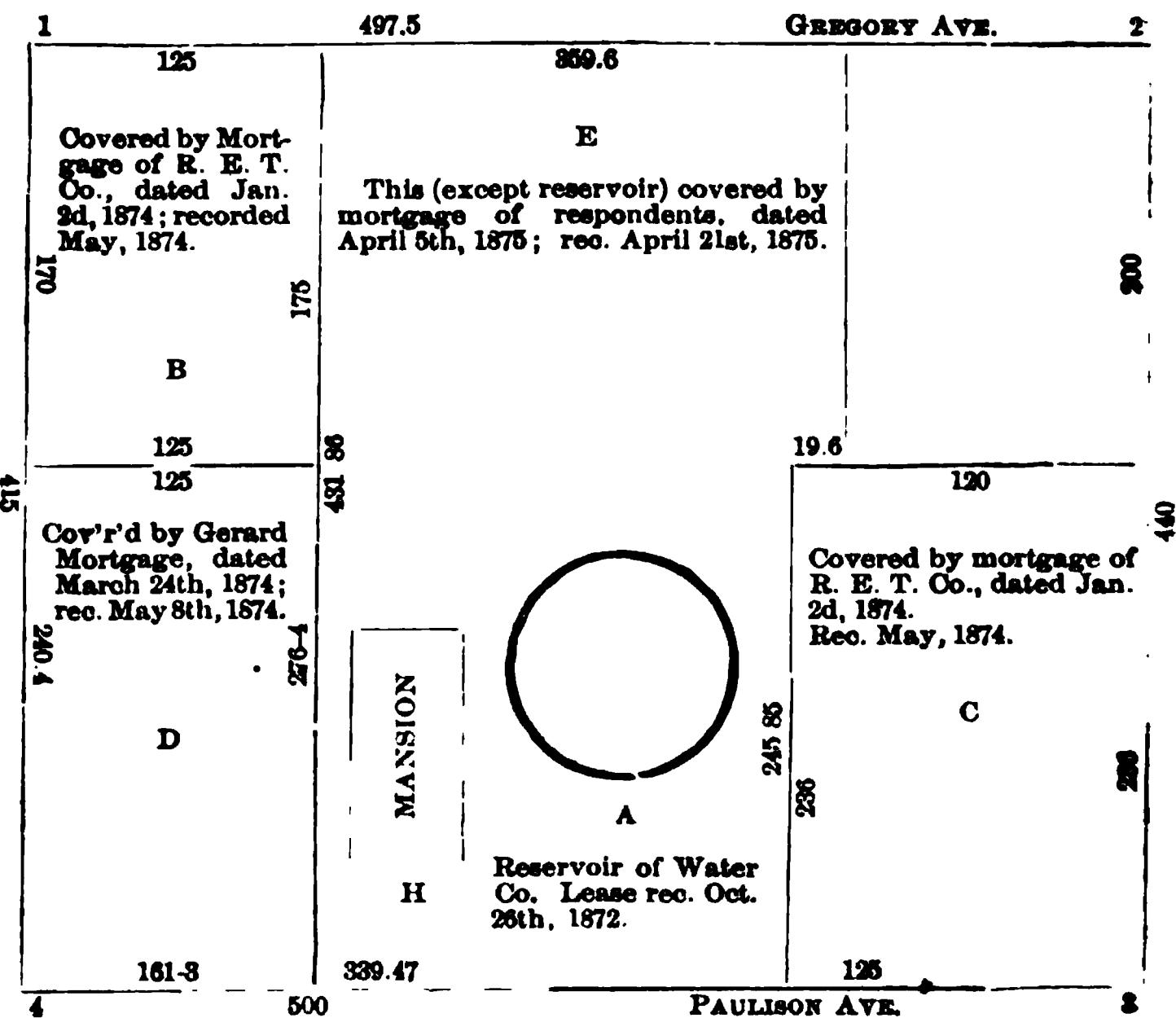
Acquackanonk Water Co. v. Manhattan Life Ins. Co.

THE ACQUACKANONK WATER COMPANY, appellants,
v.

THE MANHATTAN LIFE INSURANCE COMPANY, respondents.

The complainant, being the earliest grantee of owner, had an equity against mechanics lien-claimant to have its property sold last to satisfy the lien. A subsequent mortgagee of another portion of the lien-curtilage obtained a decree of foreclosure, to which complainant was not a party, excepting expressly the complainant's interest from the foreclosure sale. After this decree, the mortgagee bought up the lien-judgments and thereunder sold the interest of the complainant, excepting from such sale other parts of the lien-curtilage.—*Held*, that this was an inequitable use of the law-judgments, by which the due order of priority was reversed. The mortgagee who purchased at sale on lien-judgments enjoined from prosecuting ejectment against complainant.

On appeal from a decree advised by Advisory Master Gum-
mere, on his findings, as follows:



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Facts.—On March 4th, 1876, Birch & Bender, under whom the respondents claim title, filed a mechanics lien against the entire premises shown on the above diagram.

The circle on said diagram marked A, represents the reservoir of the appellants. B, C, D and E represent, respectively, the parcels covered by the mortgages of the Real Estate Trust Company, Gerard and the Manhattan Life Insurance Company. All the mortgages were executed subsequent to the commencement of the erection of the mansion, which was in 1872.

Pending the proceedings under said lien-claim to sell the entire tract, the mortgagees of plots B, C and D negotiated with the respondents, mortgagees of E, for leave to contribute their *pro rata* shares of the lien-judgment of Birch & Bender and the lien-claims of other claimants. The negotiation resulted in such contribution being made by said mortgagees of plots B, C and D, and accordingly those plots were exempted from the sheriff's sale under the execution on said lien-judgment of Birch & Bender.

Order of Transactions.—1. Possession by water company and construction of reservoir in 1871. 2. Commencement of mansion, on plot E, before October in 1872. 3. Lease to water company executed October 18th, 1872. 4. Said lease to water company recorded October 26th, 1872. 5. Mortgages to Real Estate Trust Company, on B and C, executed January 2d, 1874. 6. Mortgage to Gerard on D, executed March 24th, 1874. 7. Mortgage to Manhattan Life Insurance Company on E, executed April 5th, 1875. 8. Filing of lien-claim by Birch & Bender, March 4th, 1876. 9. Contribution by mortgagees of B, C, D and E, June 12th, 1877. 10. Entire tract, including reservoir A, advertised to be sold under Birch & Bender's lien-judgment on August 5th, 1876. 11. Plot E, including reservoir A, sold to mortgagees of plot E, under Birch & Bender's lien-judgment, on August 4th, 1877.

The appellants, lessees of the reservoir property, seek the same privilege that was allowed the mortgagees of plots B, C and D, namely, to contribute their ratable share of the amount of the liens that embraced their property, and thereupon have

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their property relieved from the effect of the liens. They contend that the sale on the lien-judgment of Birch & Bender, under the circumstances of the case, should not be a barrier, and that the petition should be regarded as favorably as if made prior to the sale.

Findings.—The complainant corporation avers in the bill, that in August, 1871, Anna Paulison, by her agent, C. M. K. Paulison, agreed by parol to let to it the lands set forth in the bill, for the term of twenty-one years, with the privilege of renewal, for successive terms of twenty-one years each, perpetually, for the use of erecting and maintaining thereon a reservoir and pipes for holding and supplying water. This agreement was for a term of twenty-one years from August 22d, 1871, with renewals, and the rent agreed upon was that the said Anna should have the right to draw from said reservoir all water necessary for the use of her dwelling the erection of which was then contemplated, the porter's lodge, stable &c. &c. Under this agreement the complainant entered upon the lands in question, and began the erection thereon of a reservoir and pipes in September, 1871, and completed such erection in November, 1871.

In the summer of 1872, Anna Paulison began the excavation for the dwelling-house referred to in the above-mentioned parol agreement.

The complainant repeatedly asked C. M. K. Paulison to deliver it a lease conformably to the terms of the parol agreement; no lease was executed in conformity to those terms, but Paulison finally, as agent for Anna Paulison, insisted upon different terms, and in October, 1872, and some weeks after the commencement of the excavation for the above-mentioned dwelling, Paulison and Anna, his wife, executed and delivered to the complainant, and it, with notice of such excavation, accepted a lease demising the lands comprised in the parol agreement, and described in the bill, for the term of twenty years from July 1st, 1872 (instead of twenty-one years from August 22d, 1871, the term agreed by the parol agreement to be demised), reserving an annual rent of \$100 during the term, in addition to the use of water for the dwelling-house &c., fixed by the parol agreement;

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the lease contained covenants of renewal for successive terms of twenty-one years each, perpetually, and in that respect conformed to the parol agreement; but it also contained a provision that the lessors might at any time terminate the demise upon giving one year's notice and paying the lessee the sum of \$5,000. This last provision is not alleged in the bill to have been one of the terms of the parol agreement, and although Thomas D. Hoxsey testifies in general terms that the parol agreement was embodied in the lease, yet such testimony cannot prevail to engraft upon the parol agreement a term so important as this provision in addition to those deliberately pleaded by the bill.

This lease was recorded in the clerk's office of Passaic county on October 27th, 1872.

In 1876, Birch & Bender filed a mechanics lien claim against C. M. K. Paulison, builder, and Anna Paulison, owner, upon the dwelling-house aforesaid, and the curtilage upon which the same was erected, which curtilage comprised not only the lands demised to the complainant, but also lands comprised in certain mortgages held respectively by the defendant and by James W. Gerard, and the New York Real Estate Trust Company. Birch & Bender brought suit upon their said lien-claim against said builder and owner, and recovered judgment in May, 1876, which was adjudged to be a lien upon such estate as Anna Paulison, owner, had in the curtilage described at the date of the commencement of the erection of said building, and a special *fi. fa.* was issued thereon in May, 1876.

A number of other lien-claimants filed their lien-claims against the same building and curtilage or parts thereof, and obtained like judgments against the same, to wit, Anderson, Falstrom & Tornquist, Burke, Dowd and Driscoll.

The defendant afterwards foreclosed its aforesaid mortgage and made the lien-claimants above mentioned parties defendant, and in that suit the said six lien-claims were adjudged to be prior encumbrances to the mortgage of the defendant; the defendant thereupon purchased said lien-claims, paying the full amount due thereon, say \$3,200, and took assignments thereof.

James W. Gerard, one of the mortgagees above named, applied:

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to the Passaic circuit court to reduce the curtilage described in said lien-claims, which application was refused, and the same mortgagee in a suit in chancery, in which the defendant and the lien-claimants were made parties, sought to have the premises covered by his mortgage exempted from the said liens, which relief was refused.

An arbitration was then had between the defendant James W. Gerard and the New York Real Estate and Trust Company to determine the proportionate parts which should be paid by each to satisfy the common burden of the liens; the proportions were determined and paid accordingly.

A special *fi. fa.* was issued upon the judgment recovered by Birch & Bender to make sale of the dwelling and curtilage comprising the lands demised to the complainant, and lands covered by the respective mortgages of the defendant James W. Gerard and the New York Real Estate and Trust Company, and under that writ the premises were advertised for sale on August 5th, 1876. On that day the sale was adjourned and notice was duly published of the day to which the sale was adjourned. It was further adjourned for one week, and thereafter, by direction of the plaintiff's attorney, adjournments were made from week to week, until the sale was actually made on August 4th, 1877. Prior to that sale, and after James W. Gerard and the New York Real Estate and Trust Company had paid their respective contributions toward re-imbursing the defendant for the amount expended by it in the purchase of the aforesaid lien-claims, the chancellor, upon their application, restrained the sheriff from selling those portions of the curtilage which were conveyed by their respective mortgages, and on August 4th, 1877, the sheriff sold the residue of the curtilage, comprising the lands demised to the complainant, to Mr. Fellows, the attorney of the defendant, for the sum of \$385, and Fellows subsequently conveyed said lands to the defendant for a nominal consideration.

In October, 1878, the defendant began an ejectment suit against the complainant to recover the possession of that portion of the aforesaid curtilage so sold by the said sheriff, comprised in

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the aforesaid lease made by the Paulisons to the complainant, and thereupon the complainant filed its bill, praying that the defendant be enjoined from prosecuting said ejectment, and that the amount the complainant should equitably contribute towards the payment of the same bid at the sheriff's sale under the Birch & Bender judgment and execution should be ascertained by this court, and that upon payment of such contribution, the complainant should hold the lands demised to it according to the terms of said lease.

I determine as matter of law :

a. That the complainant took the interest, under the parol agreement for a lease and its entry thereunder upon the lands described in the bill in that behalf, of a tenant from year to year, and that its possession of said lands was that of a tenant from year to year, and that it had no other right in said lands at law or in equity, by virtue of said parol agreement.

b. That the complainant had notice of the commencement of the excavation for the dwelling erected upon the lands of Anna Paulison.

c. That with notice of such excavation, and of the liability of the curtilage to mechanics liens, the complainant, after such excavation was commenced, accepted from the Paulisons a lease demising a different term of years, reserving a different rent, and containing different covenants from the term, rent and covenants agreed upon in the parol agreement; and that by such acceptance of said lease the complainant surrendered whatever rights it had theretofore possessed or claimed under the parol agreement aforesaid, and thenceforth had no other rights in the demised premises than those conferred by said lease, which rights were subject to all liens upon said building incurred in the erection thereof.

d. That as lessee for a term, the complainant was not an owner of any part of the premises comprised in the curtilage described in the lien-claim of Birch & Bender, according to the intent of the mechanics lien law, and that it was not a necessary or proper party to the suit to enforce their lien in the Passaic circuit court

e. That the complainant had notice of the erection of the said

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dwelling, and constructive notice of the attaching of Birch & Bender's lien, of the filing of the claim, of the suit and judgment thereon, of the issuing of the execution and of the sale thereunder of the premises in question.

f. That the complainant was not surprised by the sale, by reason of the adjournments thereof from week to week by the direction of the attorney of the plaintiffs at law, but that by reason of its own laches and negligence it was in fact ignorant of the existence of the lien-claim and of all the proceedings thereon.

g. That the defendant is in no wise responsible for the action of the sheriff in selling a part only of the curtilage described in the execution at law; that the sheriff was enjoined by a competent court from selling any greater portion of said curtilage, of which action the complainant had constructive notice and took no steps to contest or review it, and that the sheriff's sale was valid and effectual in law.

h. That the complainant is not entitled to the injunction and contribution prayed in his bill, and that the said bill should be dismissed.

Mr. Thomas M. Moore, for appellants.

Mr. John R. Emery, for respondents.

The opinion of the court was delivered by

VAN SYCKEL, J.

Anna Paulison being the owner in fee of the premises marked 1, 2, 3, 4 on the above diagram, agreed by parol in August, 1871, to let a portion thereof to the Acquackanonk Water Company for the term of twenty-one years, with the privilege of successive renewals, for the purpose of erecting thereon a reservoir with connecting pipes, for water-works. In pursuance of this agreement the water company constructed the reservoir marked A on the diagram, with the necessary connections to supply water.

After repeated attempts to obtain from Mrs. Paulison a written lease in accordance with the terms of the verbal agreement, the

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water company in October, 1872, accepted from her a lease in writing upon somewhat different terms. This lease, which was recorded on the 26th day of October, 1872, must be presumed to embody the terms of their contract.

In the summer of 1872, and before the execution of the said lease, Mrs. Paulison commenced the erection of a dwelling-house upon the said premises, marked H on the diagram.

In January, 1874, lots marked B and C were mortgaged by Mrs. Paulison to the Real Estate Trust Company.

In March, 1874, she mortgaged lot marked D to one Gerard.

In April, 1875, she mortgaged lot E to the Manhattan Life Insurance Company, expressly reserving to the said water company the reservoir, connecting pipes and its rights under the aforesaid lease.

In March, 1876, Birch & Bender filed a lien-claim against the said dwelling-house, including the entire premises marked 1, 2, 3, 4, as the curtilage. Unsuccessful attempts were made to reduce the curtilage.

Subsequently, judgments were obtained by Birch & Bender and by other lien-claimants, in all amounting to about \$3,200. A special *fi. fa.* was issued upon the Birch & Bender judgment for the sale of the entire lot 1, 2, 3, 4.

The Real Estate Trust Company filed a bill to foreclose its mortgage, making the lien-claimants parties.

Gerard filed a like bill.

The Manhattan Life Insurance Company filed a bill to foreclose its mortgage on the 5th of May, 1876, making the lien-claimants parties, on which a decree was rendered July 10th, 1877, declaring the lien-claims to be prior to said mortgage, and directing that lot marked E be sold, expressly reserving and excepting therefrom the said water company's reservoir, pipes and rights under said lease, to pay and satisfy in the first place the said several lien-claims, and in the second place the said mortgage of the said Manhattan company.

The said water company was not made a party to any of these foreclosure suits.

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Execution was issued upon this decree, directing a sale in pursuance of the terms thereof.

Soon after the filing of this bill of foreclosure the special *fi. fa.* was issued upon the judgment of Birch & Bender.

Thus the sheriff had in his hands the execution on the lien-judgment, directing the sale of the entire premises 1, 2, 3, 4 to pay the lien-claims, and also the execution on the said Manhattan company's decree, directing the sale of lot marked E, excepting the water company's rights as aforesaid.

The Real Estate Trust Company, the Manhattan Life Insurance Company and Gerard arbitrated as to the amount each should contribute to the satisfaction of the lien-judgments, and on the 12th day of June, 1877, the arbitrators made an award, in which the said parties acquiesced.

Thereupon the Real Estate Trust Company paid the proportion assigned to it, and upon petition to the chancellor obtained an injunction restraining Birch & Bender from selling under the lien-execution the land mortgaged to it.

Gerard obtained a like injunction as to the premises mortgaged to him.

The water company was not a party to any of these proceedings.

The Manhattan company purchased the lien-judgments and took an assignment thereof, and after the arbitration, on the 4th of August, 1877, procured a sale to be made by the sheriff under the lien-executions of the entire premises marked 1, 2, 3, 4, excepting only lots B, C and D, and not excepting the reservoir and rights of the said water company. At that sale the said Manhattan company became the purchaser through its agent, for less than \$400, and thereby reversed the order of priority established by the decree in its own foreclosure suit.

After the purchase under the lien-execution, the Manhattan company brought ejectment against the said water company, to recover possession of that part of the said premises held by said water company under the aforesaid lease.

The water company thereupon filed its bill in the court of chancery against the said Manhattan company, praying:

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1. That the account may be taken under the direction of this court of the amount paid by the defendant or its attorney, in satisfaction of the bid made at said sheriff's sale, and of the amounts contributed by parties interested in the portions of the said curtilage not sold at said sale, towards re-imbursing said defendant for said bid.

2. That the relative values of the estate of your orator in the lands demised to it in and by said lease, and the remaining portion of the lands sold and conveyed to said defendant, by virtue of the execution issued in said suit to enforce said mechanics lien, may be ascertained under the direction of this court, and that this court having due regard to such values may determine such proportion of the amount paid by the defendant to satisfy said bid as may be equitable to be paid by your orator to the defendant, and that upon such payment being made, the defendant may be decreed to hold the lands and tenements demised to your orator in and by the said lease, subject to the said lease and the terms and conditions thereof.

3. That the said defendant may be enjoined from its said suit of ejectment so far as the same respects the lands demised to your orator in said lease and hereinbefore particularly described.

That relief, having been denied in the court below, is sought by appeal here.

From the preceding statement of facts, there can be no doubt as to the due order of priority in equity of these several conflicting claims, assuming that the reservoir is embraced in the curtilage of the dwelling erected and so subject to the liens, which is not intended to be hereby conceded. Nor is it intended to be admitted that the lessee in possession is not to be regarded as an owner under the mechanics lien law, and as such entitled to summons.

The lien-claims were the superior lien, and the lands mortgaged to the Manhattan company should have been first sold to satisfy those claims. That proving insufficient for the purpose, the premises mortgaged to Gerard should have been next sold; then the lots mortgaged to the Real Estate Trust Company, and lastly, if any balance remained unpaid, the reservoir and interest

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of the water company. If the Manhattan company had sold under and by virtue of the foreclosure decree, the rights of all parties would have been duly regarded. By the scheme it resorted to, it has obtained an undue advantage at law, and put itself in a position that in equity it ought not to be permitted to retain. It is apparent from the case that the premises subject to the rights of the water company are worth many times the amount of all the lien-claims. The sale under the lien-execution cannot in equity be permitted to deprive the water company of its rights, from the fact that lots B, C and D were expressly excepted and reserved from that sale. Those lots, under an equitable marshaling of the assets, were subject to be sold to pay the liens before the interest of the water company in the premises was resorted to. The command of the execution at law was to sell the entire premises, and if that had been done, a surplus might have been produced to which the water company could have resorted for indemnity. The fact that the sheriff was enjoined by a competent court from selling the three parcels specified, cannot affect this controversy, for the reason that the water company was not a party to the suit in which the injunction order was issued and had no opportunity to resist it.

It is manifest that the injunction was granted upon the understanding that all parties in interest acceded to it. It was the outcome of the arbitration between the mortgagees in reference to the liens, in which the complainant in this case took no part, and of which it had no knowledge.

Such an order could not have been obtained if the *status* of the water company had been brought to the notice of the court.

The decree below should be reversed, with costs. The defendant should be decreed to hold the lands purchased as aforesaid, subject to the rights of the complainant under the said lease, and the further prosecution of the ejectment suit should be enjoined.

The defendant is not entitled to claim contribution from the complainant to the payment of the liens, unless those portions of the premises primarily liable are insufficient to satisfy the lien-claims.

Decree unanimously reversed.

Ludlow v. Ludlow.

JAMES C. LUDLOW et al., appellants,

v.

CHARLES F. LUDLOW et al., respondents.

At the time of executing a last will there must be some word or sign by the testator, or some one acting for him, in his presence and hearing, to clearly indicate his recognition of the testamentary act in which he is engaged, and of the genuineness of the signature and will which are presented to the witnesses for their attestation. The words used in the statute, "acknowledgment" and "declare," demand an open expression either in words or unmistakable acts.

On appeal from a decree of the ordinary, whose opinion is reported in *Ludlow v. Ludlow*, 8 Stew. Eq. 480.

A writing, purporting to be the last will and testament of William A. Ludlow, deceased, bearing date November 28th, 1879 (the true date being October 28th, 1879), was propounded by the executors to the surrogate, appealed to the orphans court of the county of Essex, and admitted to probate. On appeal to the prerogative court, the decree of the orphans court was reversed, and probate refused. Only the subscribing witnesses, James E. Harrison and Wesley C. Miller, were examined to prove the will in the orphans court, and on their testimony the question is raised whether the writing was legally executed. The material facts proved are that William A. Ludlow came to the store of James E. Harrison in Newark, and his brother, James C. Ludlow, was there at the same time. James came to Harrison and said: "My brother has been making his will, and I would like to have you witness it." These three went inside of a desk. James said when there: "This is my brother's will; I would like to have you witness it," then William signed it, and Harrison put his signature to it as a witness. At that time Miller was in the store, standing between the desk and the stove; the stove was about fifteen feet from the desk, and he was between them, about ten feet from the desk. James, after he had

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signed, went outside of the desk to where Miller stood, and said to him: "Mr. Miller, Mr. Harrison has been kind enough to witness my brother's will, now I want you to." Harrison went from the desk as Miller entered it, to about where Miller had stood to make room for him, and Miller stood at the desk beside William and signed his name as witness. The desk is described as a low enclosure with transparent glass at the top of it, about five feet high, and open at the easterly end. Miller did not see William A. Ludlow or Mr. Harrison sign the paper, and says that when they and James were in the desk he did not know what they were doing, but had the impression that William was making his will, and got that impression from the fact that James C. Ludlow had told him, from two to four weeks before, that his brother was about to make his will, and he thought to have Mr. Harrison and him to witness it; and as he came in that morning and went behind there to write, he presumed that was it. He says he was attending to his business, and may have glanced at them, but did not know what they were doing. He was where he could see them, and where William could see him. He further says, in answer to questions put to him, that he did not see Mr. Harrison sign the paper; he did not see William A. Ludlow sign it; that he, William, did not say anything to him; did not say it was his last will, and did not request him to sign it. He also says that James said nothing to him, only what he said outside about the will, and that this was spoken in an ordinary tone. He did not hear anything said inside the desk, and does not know whether William heard James request him to witness the will. At the foot of the writing, above the name "Wm. A. Ludlow," were the words, "Signed and sealed this twenty-eighth day of November, in the year of our Lord eighteen hundred and seventy-nine," and over the names of the witnesses, the words "In the presence of."

Mr. T. N. McCarter, for appellants.

Mr. J. W. Taylor, for respondents.

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The opinion of the court was delivered by

SCUDDER, J.

After careful consideration of the evidence of the subscribing witnesses to this writing, with the desire, if possible, to give effect to the apparent intention of the decedent, I have been unable to reach the conclusion that it should be admitted to probate. The statute of March 12th, 1851, prescribes the formalities to be observed in the due execution of wills and testaments, and unless these appear in some manner, there is no legal sufficiency to devise, pass or bequeath the estate and property of the owner. These requirements differ from those found in the laws of other states, and in the various decisions which have been given, we are likely to be misled, unless these differences, and the exact statements of facts are most closely observed. It is, therefore, safer and easier to interpret the words and phrases of our own law by the usual rules of construction, and apply them to the facts of each case as they may be presented. In making this examination we are struck with the number and particularity of these forms, as if it were the purpose of the law to protect the person who would dispose of property by will, from the possibility of deception or undue influence. By our law, the will and testament (1) shall be in writing; (2) shall be signed by the testator; (3) this signature shall be made by the testator, or the making thereof acknowledged by him; (4) and such writing declared to be his last will in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses, in the presence of the testator. The last clause, relating to the presence of witnesses and the presence of the testator, requires that all shall be together when the signature is made, or the making thereof acknowledged, and when the declaration that it is his will is made. Our earlier statute, passed March 17th, 1714, required that all wills and testaments to devise lands, tenements and hereditaments should "be made in writing, signed and published by the testator in the presence of three subscribing witnesses." This differs from the English statute of 9 Car. II. c. 3 § 5 mainly in the points that while by the latter the will

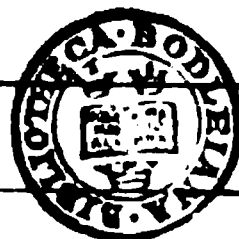
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shall be signed only, our statute requires that it shall be both signed and published; and while by the construction given to the English statute, an acknowledgment by the testator of his signature in the presence of witnesses was sufficient, although they did not see him sign his name, such acknowledgment was not by our law regarded as proof of the signing. *Combs v. Jolley*, 2 Gr. Ch. 625. These differences are compared and discussed in *Compton v. Mitton*, 7 Hal. 70.

The expression "in presence of witnesses," used in the statute, is there said to be satisfied if the subscribing witnesses were so situated that they could and would naturally see the signing and hear the publishing. The statute of 1851 changed this law, made the acknowledgment of the signature proof of signing, retained the act of publication, in different phraseology, in the presence of two witnesses. The alteration made by substituting "declared to be his last will" for "published by the testator," does not change the requirement that there shall be some word or act by the testator, or in his presence, by which it may be manifested to the witnesses called to attest that the testator knew, and wished them to know, that he was executing his last will and testament. *Mundy v. Mundy*, 2 McCart. 290; *In re McElwain's Will*, 3 C. E. Gr. 499.

The words of attestation above the names of the testator and the witnesses in this paper, "signed and sealed &c.," and "in presence of," are not proof of publication according to the statute. In *Compton v. Mitton* and *Combs v. Jolley*, the court say that the better and safer rule is to require a literal construction of the statute in regard to the publication; and in *Allaire v. Allaire*, 8 Vr. 312, 325, it is said that, if the attestation clause does not contain all the requisites to the making of a will, affirmative proof must be made of its execution in the manner and with the formalities prescribed by the statute. With this burden of proof resting on the proponents, and with the requirements of the statute before us, we must examine the facts of this case to see whether there has been a due execution of this will. In some points it is conformed to the statute. It is in writing; it is signed by the testator; it is attested by the names of two wit-

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nesses; but the signature was not made in the presence of two witnesses present at the same time. This is manifest from the facts that Mr. Miller was ten feet away from the place where the signature was made inside the desk; he was at the time engaged in his work in the store, and his attention had not been specially called at that time to the act in which William A. Ludlow was engaged. Mr. Harrison was near and saw him sign his name, but Mr. Miller testifies that he did not see him writing, or subscribing his name to the paper, nor did he know at the time that he was executing his will. He was not then a witness, called upon for that purpose. If the writing was legally executed, it must be under the alternative requirement that the making of the signature was acknowledged by the testator in the presence of two witnesses present at the same time. But there was no acknowledgment of the signature, nor any declaration of the testator that the writing was his last will and testament, in the presence of two witnesses present at the same time. This was not done in words, for the only expression of William A. Ludlow after he came into the store, testified to by the witness Mr. Harrison, was his salutation of "good morning" as he entered. Nor does it appear that by any act he designated the signature as his, or the writing as his will, when both witnesses were present. It is left uncertain by the evidence whether the request made by James C. Ludlow, when he went to Mr. Miller and asked him to witness the will, was heard by his brother, who was standing inside the desk. It is not necessary that the testator should, by his own words, acknowledge the signature, and declare the writing to be his last will; this in some cases may be impossible through sickness or bodily infirmity. It may be done in his presence and hearing by another acting for him with his assent. *Whitenuck v. Stryker*, 1 Gr. Ch. 8. But he must, by some word or sign, clearly indicate his recognition of the testamentary act in which he is engaged, and of the genuineness of the signature and will which are presented to the witnesses for their attestation. The words used in the statute, "acknowledgment" and "declared," demand an open expression either in words or unmistakable acts; and we have no right

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to change their obvious meaning, or substitute conjecture for positive proof of conformity to their requirement.

The case of *Inglesant v. Inglesant*, L. R. (3 P. & D.) 173, where the will was admitted to probate, most nearly resembles this case in the facts, but the English statute of wills (1 Vict. c. 26 § 9) does not require any declaration or publication by the testator in the presence of witnesses, in addition to the acknowledgment of the signature. But in this case the counsel against the will said that in all the reported cases the testator did some act or said some word during the proceeding, and cited many authorities for his assertion. The late case of *In re Goods of Mary Gunstan*, L. R. (7 P. D.) 102 (1882), upon another point is instructive on the question of the sufficiency of an acknowledgment under the statute, and many previous cases are examined. The court say that not only must there be an acknowledgment, within section 9 of the wills act, but the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator. But I have purposely avoided other references to cases decided elsewhere, for reasons already given.

Upon another point presented in the argument of counsel it is very certain that the affidavit of James E. Harrison, one of the subscribing witnesses, taken before the surrogate, when the will was propounded for proof before him, cannot have the effect claimed for it, of outweighing the evidence of both Harrison and Miller, who describe particularly the manner of the execution of the will. Where there is a perfect attestation clause, supported by the affidavit of one of the subscribing witnesses, the presumption is very strong in favor of the due execution of the will; but where the attestation clause is defective, as in this case, and from the testimony of both witnesses it appears that the will was not duly executed, the customary formal affidavit of one of them on offering the will for probate is entitled to little weight. The case of *Wright v. Rogers*, L. R. (1 P. & D.) 678, cited by the proponents' counsel, was unlike this. There was a full attestation clause, and one of the witnesses had died; the other testified that the will was not duly executed, but the court doubted

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this evidence, which was opposed by proof, and gave effect to the attestation. In *Croft v. Croft*, 4 Sw. & Tr. 10, where both witnesses swore that the will was not duly executed, and there was no opposing proof, the will was rejected. The full particulars given by both witnesses, where there is no failure of memory or apparent purpose to deceive, are better evidence than the general affidavit of one witness to the will, and should control the judgment of the court.

The decree of the ordinary will be affirmed and the will admitted to probate, but, under the circumstances, costs of all parties, including a counsel fee of \$100 to each side in this court, will be ordered to be paid out of the estate.

Decree unanimously affirmed.

SARAH H. RUSLING et al., appellants,

v.

JAMES F. RUSLING et al., respondents.

1. When, upon a *caveat* against the probate of a will, the orphans court certifies the questions involved to the circuit court for trial by jury, pursuant to section 19 of the orphans court act (*Rev. p. 756*), and on the coming in of the finding the orphans court decrees accordingly, an appeal to the ordinary opens for consideration not merely the propriety of the decree, but the right to probate of the will. On such appeal, the ordinary may decide the question on the evidence before the jury, or on additional proofs taken in accordance with the practice of the prerogative court.

2. On an issue whether a will is the product of undue influence, the declarations of the testator respecting previous occurrences which are alleged to have exerted the influence, are not evidence to prove or disprove such occurrences.

3. The fact that a will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not of itself invalidate the will.

On appeal from a decree of the ordinary, whose opinion is reported in *Rusling v. Rusling*, 8 Stew. Eq. 120.

Busling v. Busling.

Mr. A. G. Richey and Mr. Gilbert Collins, for appellants.

Mr. Barker Gummere, Mr. W. D. Holt and Mr. M. Bensley, Jr., for respondents.

The opinion of the court was delivered by

DIXON, J.

The appellants, a son and the widow of Gershom Rusling, deceased, impeach the validity of his will, executed with due formality on January 4th, 1875.

Upon their *caveat* against its probate, the orphans court of Mercer county certified the question involved to the circuit court for trial before a jury, pursuant to the nineteenth section of the orphans court act. The verdict of the jury was against the validity of the will, both for want of mental capacity in the testator and because of undue influence exercised by the principal legatees. This verdict, with the evidence taken and other proceedings in the circuit being returned to the orphans court, a decree was there entered refusing probate; from which decree the proponents, the other two sons of the testator, who are the executors and principal legatees under the will, appealed to the prerogative court, and there the ordinary, deeming the evidence insufficient to establish either ground of invalidity, admitted the will to probate. From his decree this appeal is made.

The first question presented for decision is whether the ordinary had the right to look into the testimony taken at the circuit, for the purpose of passing upon the propriety of the verdict. The appellants contend that the verdict is conclusive as to the facts.

The constitution (*Art. VI. § 4 ¶ 3*) provides that all persons aggrieved by any order, sentence or decree of the orphans court may appeal from the same or any part thereof to the prerogative court. This provision was merely declaratory of the pre-existing law, for the statute of December 16th, 1784 (*Pat. p. 59*), ascertaining the power of the ordinary, stated that his authority should thereafter extend only to the granting of pro-

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bate of wills &c., and to the hearing and finally determining of all disputes that might arise thereon (section 1), and that the determination by the orphans court of disputes respecting the probate and existence of wills, should be subject to an appeal to the prerogative court (section 15). So, in substance, have stood our statutes ever since. *Rev. "Courts" p. 220 § 49, and "Orphans Court" p. 791 § 176.*

The appeal indicated in these several enactments was always, prior to the statute allowing trial by jury, regarded as opening for consideration, not merely the propriety of the decision of the orphans court, but the whole merits of the controversy, if the prerogative court so ordered.

Until 1820, there was no statute directing or authorizing the evidence upon which the orphans court decided, to be preserved, but in that year it was enacted (*R. L. of 1821 p. 783 § 21*) that in all causes heard in a summary way upon citation by the orphans court, the evidence and proceedings, upon the application of either party, should be reduced to writing by the register of the court. Depositions so taken were to be sent up to the prerogative court on appeal, and there the ordinary might, in his discretion, either determine the issue upon the proofs so certified, or permit additional testimony to be adduced. If the evidence taken below had not been preserved, he could investigate the subject of controversy *de novo*. *Read v. Drake, 1 Gr. Ch. 78.* Whether this power of taking testimony in the appellate court extended to all appeals, has not been exactly decided; but in *Sayre's Administrators v. Sayre, 1 C. E. Gr. 505*, Chancellor Green intimates that it is probably confined to that class of cases in which the prerogative court possesses original as well as appellate jurisdiction; and this accords with the rule usually governing purely appellate tribunals, which never (it is said) permit new evidence to affect the rights of parties. *Black v. D. & R. C. Co., 9 C. E. Gr. 455, 479.*

In view of such powers and practice of the prerogative court, the legislature, in the revision of 1874 (*p. 756 §§ 19, 20*), enacted that, upon a *caveat* against the probate of a will, the orphans court might certify the questions involved to the circuit

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court for trial by jury; that upon the trial in the circuit, the testimony of the witnesses should be taken down in writing, if required by either of the parties, and that the verdict, with the testimony, if so reduced to writing, a copy of the charge to the jury, and all exceptions taken to the admission or rejection of evidence and to the charge, with other proceedings at the trial, should be certified and returned to the orphans court, and filed by the surrogate; and thereupon, the orphans court is required to make decree touching the probate in accordance with the finding of the issue by the jury.

This statute is manifestly not designed to restrict the powers of the prerogative court. It is silent on that subject. It leaves untouched the right of the ordinary, on appeal, to determine whether a will shall be admitted to probate as an original question before him, without regard to the propriety of the decree of the orphans court upon the matters submitted to its judgment.

The provisions for placing upon the record the evidence, the judge's charge and the exceptions at the trial, indicate a purpose to have these matters open for review somewhere. Although the statute authorizes the circuit judge to ask the advice of the supreme court as to granting a new trial, yet it gives to the parties no right to appeal from any adverse decision at the circuit. No writ of error will lie to review such decision, for the reason that the circuit renders no final judgment. The orphans court is expressly limited by the statute to the making of a decree in accordance with the finding of the jury, and this decree cannot be removed into the supreme court, since its subject-matter is within the jurisdiction of the orphans court. *N. J. Const., Art. VI. § 4 ¶ 3.* There is, therefore, no possible mode whereby the review for which the legislature seems to have made provision, can be had except on appeal to the prerogative court, and thence to this court of last resort. On such appeal, the question for decision remains the same as it was on similar appeals before this statute, viz., not the propriety of the decree below, but the right to probate of the will. Generally, if the testimony taken at the circuit has been sent up, the ordinary will decide the issue upon that evidence; but by order of the court on proper occasion,

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further proofs may be brought in, or if the testimony does not appear upon the record, original proof may be made, according to the practice of the court.

We think, therefore, that the ordinary was justified in exercising the power of looking into the evidence.

This brings us to the inquiry whether he did right in admitting the will to probate.

Two grounds of invalidity are alleged by the caveators : first, want of testamentary capacity in the testator ; second, undue influence by the proponents.

It is not necessary to state in this opinion, with any degree of detail, the evidence offered to show the testator's mental incapacity at the time of executing this will, January 4th, 1875. It is enough to say that in our judgment it establishes nothing more than an occasional forgetfulness of the names and faces of persons with whom he did not come into frequent contact. His power to recollect his nearer kindred and to appreciate their claims upon him, to comprehend the amount and character of his estate and to intelligently direct its distribution, does not appear to have been seriously impaired. Such capacity is sufficient for the making of a valid will. *Stevens v. Van Cleve*, 4 Wash. C. C. 262; *Stackhouse v. Horton*, 2 McCart. 208; *Boylan ads. Meeker*, 4 Dutch. 274.

For the proof of undue influence, the caveators mainly rely upon declarations of the testator, made some time before and some time after the execution of the will, respecting the conduct towards him of the favored legatees. These declarations are not admissible as evidence of the facts which they were offered to prove.

/ When undue influence is set up in impeachment of a will, the ground of invalidity to be established is, that the conduct of others has so operated upon the testator's mind as to constrain him to execute an instrument to which, of his free will, he would not have assented. This involves two things : first, the conduct of those by whom the influence is said to have been exerted ; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of

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mind of the decedent and his testamentary purposes, both immediately before the conduct complained of, and while subjected to its influence. In order to show the testator's mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise, the state of the mind at one time is competent evidence of its state at other times not too remote, because mental conditions have some degree of permanency. Hence in an inquiry respecting the testator's state of mind, before or pending the exertion of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and, through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay. They cannot be regarded as evidence of previous occurrences, unless they come within one of the recognized exceptions to the rule excluding hearsay testimony. These exceptions concerning the declarations of deceased persons are stated by Jessel, M. R., in *Sugden v. Lord St. Leonards*, L. R. (1 P. D.) 154, 240, to embrace the following: first, a declaration accompanying an act (i. e., an act relevant to the issue); secondly, a declaration against interest; thirdly, a declaration made by a person in the course of business, one which it was his duty to make; fourthly, declarations as to matters of public and general interest, made by persons who may, from their position, be fairly presumed to have had knowledge on the subject; fifthly, declarations by members of a family as to matters of pedigree within the family; and sixthly, the case cited decides that the testator's declarations may be received as secondary evidence of the contents of his will, when the will has been otherwise proved to have been executed and lost. To these may be added the familiar exception as to dying declarations. Outside of these classes, the unsworn narrations of deceased persons are not, I think, competent evidence of their own truth.

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The declarations offered in the present case do not come within any of the exceptions.

Such statements have sometimes been received upon the ground that they are admissions by an owner to whom the party, against whom they are offered, is privy in estate. But not every such statement is competent evidence; only those relating to the title of the declarant are admissible in evidence against his privies. The declarations now under consideration are not of this character.

There is no legal principle upon which they can be treated as evidence of acts constituting undue influence.

The weight of authority touching this matter is in accordance with true principle, but it is not necessary here to review the cases. In *Boylan* ad. *Meeker*, 4 *Dutch*. 274, Whelpley, J., refers to many of them, examining the point with much care; and more recently, in *Shailer* v. *Bumstead*, 99 *Mass.* 112, Colt, J., has discussed the subject with great clearness of discrimination, the conclusion in both opinions being that at which we have arrived. In *Horn* v. *Pullman*, 72 *N. Y.* 269, the principle is assumed as indisputable.

Leaving out of view, then, any declarations of the testator, as evidence of attempts to influence his testamentary purposes, there remain to be considered only two matters which at all suggest the possibility of such influence.

The first is the fact that the will in question was drawn by one of the favored legatees. While this circumstance does not of itself invalidate a will, it certainly is a matter which excites the judicial mind to suspicious scrutiny. In *Den* v. *Gibbons*, 2 *Zab.* 137, Chief-Justice Green is reported to have said that where the testator was very infirm and the will executed in the article of death, it had been rightly held that the preparation of the will by the principal legatee was conclusive against its validity. So, other concomitants might readily be suggested, which would give to the fact that the favored party had drafted the instrument, almost irresistible force as evidence that the alleged testament was not the will of the decedent. But in the present case, this fact stands substantially alone as ground of suspicion.

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When the will was drawn, the testator did not reside with, or depend to any degree upon his son, the draftsman, but lived in cordial relations with his own wife, who is now a contestant; the execution of the will was not concealed, but was a subject of conversation between the testator and this son in the presence of testator's wife, just before they went to the son's office to prepare and execute it; the will evinces no marked change of testamentary purpose, for it corresponds closely with two wills executed within fifteen months previous, in the preparation of which the accused legatee took no part; this legatee is a lawyer, to whom, therefore, it was natural that his father should look for aid in drafting a legal instrument. He is placed by the will on only an equal footing with another of the three children of the testator living at its execution, and there appear grounds on which it is probable the testator might conclude to discriminate, as he has, against the third son; and lastly, the testator's mind seems to have been clear and vigorous, subject only to such defect of memory as is usually incident to old age. So that there is neither mental imbecility, dependence on the legatee, glaring change in testamentary intention, unreasonable or inofficious bequests in favor of the legatee, attempts on his part to conceal from others interested knowledge of the will, strangeness in the fact that the legatee drafted the will, or any other circumstance tending to confirm the suspicion which that fact may engender. Under these conditions, the suspicion should be laid aside.

The second matter adduced as indicative of undue influence, may be briefly adverted to: it is, that more than two years after this will was signed, the contestant son was invited by his father to visit him, and during the visit the testator expressed dissatisfaction with his will and a desire to change it; that then an altercation arose among the sons in their father's presence, and, after an interview apart with the two favored sons, the testator said he could not have this trouble, and the will must remain as it was. Aside from the denial, on the part of the proponents, that such an occurrence took place, we think that it is not to be inferred from this instance of acquiescence by the testator, that his will, made so long before, was the offspring of these sons' influ-

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ence. The evidence makes it quite plain that, at this later date, senile decay had made considerable inroads upon the testator's mind, and its operations then are not reliable *indicia* of what they might have been when the will was executed.

On examination of the whole case, we are convinced that the instrument propounded is the last will of Gershom Rusling, deceased, and that the decree of the chancellor should be affirmed.

Decree unanimously affirmed.

In the matter of the final account of FARRINGTON BARCALOW,
executor of William Barcalow, deceased.

On appeal from a decree of the ordinary, affirming an order of the orphans court of Somerset county, allowing the executor's account, reported in *Barcalow's Case*, 2 Stew. Eq. 282.

Mr. J. J. Bergen, for appellants.

Mr. J. D. Bartine, for respondent.

The opinion of the court was delivered by

DIXON, J.

The reasons given by the ordinary for his decree are satisfactory in all respects save one.

The executor's account is stated so as to show a balance of \$6,998.37 in his hands on August 1st, 1842, at which time he had completely administered the estate up to the point of distribution among the legatees. The executor claims that he has also, in fact, made such distribution, but the orphans court regarded that as a matter not to be investigated upon this accounting. The account was not presented until 1874. The expenses of accounting are \$169.70, which being deducted from \$6,998.37, leave \$6,828.67; and the court ordered that the executor should

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account to the legatees for this last sum, with interest from August 1st, 1842.

The objection, which we think well taken, is that these expenses are deducted as though paid out in 1842, while, in fact, they were paid out in 1874, and thus the executor is allowed thirty-two years' interest on \$169.70, which he appears to have had in hand during all that time.

The decree of the orphans court should be modified, so as to order the executor to account to the legatees for \$6,998.37, with interest from August 1st, 1842, less a deduction of \$169.70, credited August 28th, 1874.

For this purpose the decree below must be reversed.

Decree unanimously reversed.

ADONIJAH S. BOYD, complainant and respondent,

v.

CASPAR ENGELBRECHT et al., defendants and appellants.

As between the original parties to a usurious loan, the taint of usury attaches to the transaction and to all substituted obligations and securities, until the usurious element is expunged.

On appeal from a decree of the chancellor, based on the following opinion :

The mortgage which this suit was brought to foreclose was given in May, 1877, for \$4,000, payable in three years, with interest at seven per cent. per annum. It is dated May 1st, 1877, and consequently came due May 1st, 1880. In the latter month, after the mortgage had matured, the complainant began a suit for foreclosure on it, which was settled between the parties in the same month and the bill dismissed, and an agreement was made between them that the time for payment of the mortgage

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should be extended for a year from May 1st, 1880; the rate of interest from that time (the interest was paid to that date) to be six instead of seven per cent. The bill in this suit was filed in June, 1881, after the expiration of that year. The defendants, by their answer, set up two defences; one, that the loan was made on a usurious agreement that the complainant should lend to the mortgagor \$3,680, for three years, at a premium of \$320, to be paid May 1st, 1880, and to be included in the mortgage, and interest at seven per cent. per annum, to be payable on the whole \$4,000; the other that on the 30th of April, 1881, the complainant agreed, by parol with the defendants, to extend the time for payment of the mortgage for one year from that date.

As to the defence of usury: The burden of proof is on the defendants. Engelbrecht swears that it was agreed between him and the complainant that the latter would lend him, not \$3,680, as stated in the answer, but \$4,000, for three years, at a premium of eight per cent., besides interest at seven per cent. per annum; and that the complainant, on the giving of the mortgage, gave him his check for the \$4,000, which he, Engelbrecht, endorsed, and they together went to the bank, and the complainant drew the money upon it, and retaining out of it \$320, which he said was for his bonus, gave the rest to Engelbrecht. He also says that he thinks he then paid the complainant \$15 for the expense of searches of the title to the property. The complainant positively and explicitly denies that there was any agreement between them for the payment of any premium for the loan; but says that it was understood between them that when the mortgagor received the money he was to pay the complainant a fair professional fee (the complainant is a lawyer) for his time expended in the examination of the title and for searches &c.; that on the delivery of the mortgage he gave the mortgagor his check for \$4,000, the money for which the latter himself—the complainant not being present—drew out of the bank, and out of it paid him \$300; that he thinks (but is not certain) that he gave the mortgagor at the time an itemized statement of his charges, adding thereto the amount of interest (\$54.90), which he claimed had

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accrued on the loan for the period, two months and twelve days, during which he says he had held the money uninvested in bank for the accommodation of the mortgagor. His charge for examining the title and making a map of the property, over and above moneys paid for official searches and fee for drawing the bond and mortgage, appears to have been \$231.25, but owing to a mistake in the calculation he, in fact, received \$230.25.

The mortgagor's testimony is not corroborated in any way. Nor, indeed, is that of the complainant. The testimony of the teller of the bank as to the person to whom the \$4,000 check was paid, is not positive enough to be effective as contradiction of the one or corroboration of the other. A careful consideration of the evidence leads me to the conclusion that the complainant did not, as the mortgagor alleges and swears he did, receive \$320 for premium, and that there was no agreement that he should receive that sum as premium. He did receive \$300, of which all but \$230.25 was for expenses connected with the search of the title, drawing the bond and mortgage, and interest on the money for the time he had held it on deposit in bank for the mortgagor between the time of making the loan and the time of giving the mortgage. There is evidence that he investigated the title, giving his personal attention to it, and employing a person in the business, for whose services, as for his own, no charge was made in the bill except as it was included in the charge of \$231.25. He swears that the mortgagor was satisfied with the bill and paid it cheerfully. The proof of the defence rests entirely on the testimony of the mortgagor, and, as before stated, it is not corroborated in any way. It is flatly contradicted in every material respect by that of the complainant. If it be suggested that the large amount of the charge made by the complainant for his fee for examining the title &c., is evidence of a usurious contract, the sufficient answer is that the mortgagor does not say that the understanding was that that charge was to be a cover for the premium. He was called to testify in rebuttal, and swore that the complainant never told him that he charged \$320 for his and his assistant's services in

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searching the title, and repeated his statement that that sum was retained by the complainant for bonus. The complainant, however, had not said that he told the mortgagor that the sum of \$320 was for compensation for searching the title, but he had said that he had told him that he charged him \$231.25 for that work, the complainant had absolutely and unequivocally denied that and he had received \$320 on any account, but testified that the amount he received was but \$300. The defence of usury is not proved. Nor is the defence that the complainant agreed to extend the time for payment of the mortgage for one year from April 30th, 1881, established. There will be a decree for complainant for the amount due on the mortgage.

Mr. G. Collins, for appellants.

Mr. S. B. Ransom, for respondent.

The opinion of the court was delivered by

DIXON, J.

The bill is filed to foreclose a bond and mortgage, given by the defendant to the complainant May 1st, 1877, for the payment of \$4,000 in three years, with interest semi-annually, at seven per cent. per annum.

The answer avers that these instruments were given upon a usurious agreement for the loan of \$3,680, being \$4,000, less eight per cent., which the mortgagee was to retain as a bonus.

The defendant's evidence is to the same effect as his answer.

The complainant admits that he received \$300 out of the \$4,000 loaned, and says that it was paid to him for two months and twelve days' interest, while the money lay idle in bank, before May 1st, 1877, for the expenses of drawing papers and making the search of title, and for his own services (he being a lawyer) in aid of the search.

The proof shows that the search and abstract were made, and the papers drawn by a third person, to whom the complainant

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paid therefor \$10; that the other expenses of search amounted to about \$5; and that the defendant paid the complainant \$15 to meet these outlays, besides the \$300 or \$320 already mentioned. The alleged interest was \$54.90; so that there remained, according to the complainant, for his services, about \$255. These services appear to have consisted of two or three visits in an office near his own, in order that he might make some inquiries from the son of a former owner of the mortgaged premises. He says that the defendant paid him this compensation, without objection, as a "fair professional fee." We are not able to believe this assertion. We think it manifest that what he received or retained, he got as a usurious bonus for the loan. Under the circumstances, we regard the amount as most reliably ascertained by the answer and evidence of the defendant. The bond and mortgage must, therefore, be treated as usurious securities for the loan of \$3,680.

The defendant has paid three years' interest at seven per cent. on \$4,000, being \$840, and one year's interest at six per cent. on \$4,000, being \$240; in all, \$1,080. The four years' interest at these rates, on the true principal, \$3,680, would be \$993.60. The difference, \$86.40, was illegal interest, which the statute requires to be deducted from the amount actually lent. The balance, \$3,593.60, without interest, is the sum due on the bond.

In May, 1880, six months' interest being apparently in arrear, the complainant filed a bill to foreclose the mortgage, incurring costs, he says, to the amount of \$46.53. In a few days the defendant paid up the interest, and thereupon the complainant discontinued his suit, without requiring payment of the costs, and agreed to reduce the rate of interest to six per cent. and extend the time for paying the principal one year. The complainant claims that this arrangement purged the bond of usury. But it is settled that, as between the parties to a usurious loan, the original taint attaches to the transaction, and all substituted obligations or securities, however remote, until the usurious element is expunged. *Taylor v. Morris*, 7 C. E. Gr. 606. Forgiving a debt of \$46.53, and consenting to demand six per cent. interest

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instead of seven per cent., when no interest whatever is due, cannot expunge the vice of exacting usury to the amount of \$320.

The defendant contends that in May, 1881, in consideration of his paying interest for the preceding six months, the complainant agreed to extend the time of payment of the principal for another year, and that the present suit, begun immediately after this payment of interest, is, therefore, premature.

We do not think that the evidence establishes such a contract.

Our conclusion is that the decree of the chancellor, giving the mortgagee principal, interest and costs, must be reversed, with costs, and the record remitted, with directions to enter a decree for the complainant for \$3,593.60, without costs in the court below.

Decree unanimously reversed.

GEORGE F. TUTTLE, appellant,

v.

AMELIA L. GILMORE et al., respondents.

1. By the terms of an instrument creating a trust, the liability imposed on and assumed by the trustee may be limited. If there be a clause fixing the trustee's liability, the rule for measuring such liability must be sought in that clause properly construed. A strict rule of construction will be applied as against such limitation on such liability, and the construction must be consistent with the object and purpose of the trust.

2. Where a clause in an instrument creating a trust exempts the trustee from liability, except for willful and intentional breaches of trust, the trustee is not exempted from liability for losses arising from his having made sales or investments without instituting proper inquiries and exercising a reasonable judgment in respect to the value of the consideration or securities received, nor for losses arising from investments of trust-funds in second mortgages, where no circumstances are shown to justify a resort to such hazardous secu-

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rities. The fact that the trustee neither made, nor intended to make, any personal gain from his acts, does not exonerate him from liability under that clause.

On appeal from a decree of the chancellor, whose opinion is reported in *Gilmore v. Tuttle*, 5 Stew. Eq. 611.

Mr. John R. Emery, for appellant.

Mr. R. Wayne Parker, for respondents.

The opinion of the court was delivered by

MAGIE, J.

On December 5th, 1867, James R. Gilmore and his wife, Amelia L. Gilmore (who had entered into an agreement of separation), conveyed to George F. Tuttle several tracts of land in Orange. On the same day Tuttle executed a declaration of trust, declaring that the lands were held by him on certain specified trusts. On March 2d, 1869, Mr. and Mrs. Gilmore modified in some respects their agreement of separation, and Tuttle, on the same day, executed, with their approval and consent, a new declaration of trust in respect to said lands. By the terms of the latter declaration (which is the one in question) Tuttle was required, among other things, to raise \$12,000 by the sale of some parts of the lands. The sum so raised was to be applied as follows: \$2,000 to be paid to Mrs. Gilmore, and \$10,000 to be held in trust during her life; part of the latter sum was to be invested in a homestead and the remainder in "good securities," the interest of which was to be paid to her for life, and thereafter the interest and principal to be otherwise disposed of. Power was also given to the trustee to sell under other contingencies.

James R. and Amelia L. Gilmore were afterward divorced and he intermarried with Amelia Burnet Gilmore.

Tuttle made sale of some lots on the tract he was directed to sell. Some of them were made at the request of Amelia L. Gil-

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more to her creditors, and the consideration went to make up the sum which was to be paid her.

Four conveyances of lots on the tract were made by Tuttle to Amelia Burnet Gilmore, the consideration of which, as named in the deeds, aggregated the sum of \$24,972.76.

The bill in this case was filed by Amelia L. Gilmore and one of her children, interested in the trust, against Tuttle, the trustee, and the other *cestuis que trustent*. It charged, among other things, that Tuttle had accepted the whole consideration of the conveyances to Amelia Burnet Gilmore in second mortgages, which had proved worthless, while the land conveyed had come into the ownership of persons against whom no lien for the purchase-money could be enforced. There was a general prayer for an account and a specific prayer that the trustee should be charged with the losses by reason of the conveyances to Amelia Burnet Gilmore.

Tuttle, by his answer, admitted making the conveyances to Amelia Burnet Gilmore. He averred that by part of the consideration thereof, a homestead had been procured, pursuant to the requirement of the trust. He admitted that the remainder of the consideration was accepted by him in second mortgages. He sets out as reasons inducing his action, that he had been unable, after much effort, to make sales for cash; that the *cestuis que trustent* had urged him to sell; that he was informed and believed Amelia Burnet Gilmore to be a woman of large property; and that, while he had doubts of the propriety of taking such securities, he was influenced by the fact that counsel to whom he applied advised him that the securities proposed would be "sufficient and proper investments" for him as trustee to make. He averred that he derived no personal benefit from the transactions, but was actuated solely by a desire to benefit the trust estate. In view of these facts he claimed not to be liable for these losses, on the ground that he was alone liable for a "willful and intentional breach of trust," under the following clause of the declaration of trust, viz. :

"And lastly, it is understood and agreed as a condition of the trust hereby assumed and declared, that I, the said George F. Tuttle, shall not be liable or

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responsible for any other cause, matter or thing except my own willful and intentional breaches of the trusts herein expressed and contained."

The evidence shows that the second mortgages received had proved worthless, except to the extent of \$1,000, which, in some way not clearly explained, had been realized thereon. The others had been cut off by foreclosures and sales under prior mortgages.

On the hearing on pleadings and proofs, the chancellor held the trustee liable to account for the lands conveyed to Amelia Burnet Gilmore at their value at the time of conveyance. The cause was referred to a master to state an account on that basis. The master's report charged the trustee with the sum of \$13,740, as the value of said lands at the time they were conveyed. The report was excepted to, on the ground that the valuations fixed by the master were excessive, against the weight of evidence, and made on erroneous principles. The exception was overruled and the report confirmed, and a final decree made thereon.

The trustee has appealed therefrom, and urges that it ought to be reversed in whole or in part. He insists, (1) that he is not liable to account for any part of the lands conveyed by him to Amelia Burnet Gilmore; and (2) that if liable, the value of the lands with which he is to be charged is much less than the value determined by the master and fixed by the decree.

The first of these contentions raises a question respecting the rule by which the trustee's liability in this case is to be admeasured. If, to the facts of this case, are to be applied the general rules governing trusts, it is manifest that the trustee cannot escape liability for the losses occasioned by his acts. This is conceded by his counsel, who only contend that the clause above quoted limits and restricts his liability so as to exonerate him in this case.

It is contended that the opinion below was erroneous in holding that the liability of a trustee could not be limited by such a restrictive clause. Such clauses in instruments creating trusts have been commonly used in England, and frequently the subject of discussion in their courts. Some of the cases cited by the

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learned chancellor, and others that might be referred to, give some countenance to the view that no effective limitation can thus be imposed on the liability of a trustee. Others of the cases cited give no, or but little, practical effect to such a clause, but rather by way of construction and application of it, than by denying the right of restriction. In the former cases but little attention seems to have been given to this point, and they are all cases which, under a reasonable construction of the clause, were correctly decided.

It would seem on principle unreasonable to contend that parties creating a trust could not, by their agreement, limit the liability which is thus imposed by one and accepted by the other of them. Nor do I understand that such a proposition has ever been distinctly enunciated and decided. On the contrary, in *Bartlett v. Hodgson*, 1 T. R. 42, the usual indemnity clause in a trust-deed, was held to take away the responsibility to which the trustees, but for that clause, would be subject. In *Wilkins v. Hogg*, 3 Giff. 116 (a case arising on trusts created by will), counsel urged that a clause restricting the liability of trustees was of no force, but Vice-Chancellor Stuart said on that point: "The argument has proceeded on the assumption that the usual indemnity clause amounts to nothing; that it never receives a literal interpretation, but that the court will look generally at the conduct of the trustees, and, for any carelessness or any act that a prudent man ought not to have committed, will visit the trustee who has been guilty of such acts, whatever may be the language of the will. That is not the law of this court." In the same case on appeal (8 Jur. (N. S.) 25) Lord Westbury said "he should have been glad to find a case warranting the conclusion that, a duty having been undertaken, any words qualifying that duty should be nugatory, but such could not be held to be the law. It was perfectly competent for a testator to define what should be the incidents to the duty of a trustee so long as he kept within the bounds of the law." In accord with this view are the American cases holding that limitations on the liability of assignees in assignments for benefit of creditors are effective. *Litchfield v. White*, 7 N. Y. 438; *Olmstead v. Herrick*,

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1 E. D. Smith 310; Hutchinson v. Lord, 1 Wis. 286; McIntire v. Benson, 20 Ill. 500; Robinson v. Nye, 21 Ill. 592.

In my judgment it is clear, both from principle and authority, that the liability imposed on and accepted by a trustee may be limited by the terms of the instrument creating the trust. If there is such a clause of limitation the rule for measuring the trustee's liability is to be sought in that clause properly construed. In construing such a clause, the meaning to be attributed to it should be consistent with the purpose and object of the trust, and a strict rule of construction should be applied as against the claim of restriction. But if, when so construed, a limitation on the liability of the trustee was clearly intended, the trustee is entitled to the benefit of it.

The clause here exempts from all liability, except for willful and intentional breaches of trust. It is, fortunately, not necessary now to determine in what cases this limitation will be practically effective. It is sufficient to determine whether it is effective under the circumstances of this case.

It is urged that the clause exonerates from all breaches of trust, except such as the trustee commits with a view to his personal advantage. But it is obvious that such a construction adds terms to the clause not contained therein and inconsistent with its plain purpose. It is a breach of trust for the trustee to speculate with trust-funds for his own gain, but it is no less a breach of trust to make unauthorized investments or take speculative risks, though for the benefit of the fund and not the trustee. To do so knowingly is a willful and intentional breach of trust. In my judgment, it is a willful and intentional breach of trust within the meaning of this clause, to knowingly do any act hazarding trust-funds, in violation of a duty imposed on the trustee. That this construction may leave but little force to the clause is no reason why it should not be adopted. If the intent of the parties was that the trustee might knowingly risk and hazard the trust-funds without liability, unless he intended to gain thereby, it was easy to express that intent in fitting words. No such words were employed, and no creator of a trust will ever be

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likely to employ them. The construction no doubt expresses the real intent of the parties.

Applying this rule, I have no hesitation in concluding that the chancellor properly held the trustee in this case liable. If the transaction complained of be considered as a sale, the trustee's duty was to ascertain and determine that the consideration he was to receive was valuable. If it be considered as an investment of trust-funds, his duty was to ascertain and determine that the securities he was to receive were "good." Since the consideration to be received and the securities to be taken were mortgages, his duty was to examine the land mortgaged, and to ascertain by proper inquiries that the value thereof was reasonably sufficient to make them good, on which he was to pass his judgment. The case plainly shows that no proper examination and determination of the value were made. The trustee admits that he had no experience justifying him in determining its value, and he procured no estimates or appraisements of its value from others. He avers that he thought the security sufficient, but is careful to say that his opinion was based partly on the advice of counsel. What other basis it had, he does not disclose. The counsel referred to is not shown to have had any knowledge of the property or its value.

The case so presented is one of a trustee deliberately accepting securities for trust-funds, with no such inquiry into values as justified a judgment as to their sufficiency. This was a willful and intentional breach of trust, for which he is liable under the clause in the declaration of trust.

It must be further observed that the securities accepted by the trustee were second mortgages. It was in such securities, which have been called "improper securities" (*Lockhart v. Reilly*, 1 *De G. & J.* 464, 476), that he placed a portion of the land impressed with the trust, although, as appears, he had no funds in the trust capable of being used for their protection in case of the foreclosure of the prior mortgages.

It may be, and probably is, true that no case can be discovered holding that the mere taking of second mortgages by a trustee as security, is a breach of trust. Cases may be imagined when

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taking such mortgages might be judicious. Under some circumstances, it is possible an investment therein might be proper. But, as was said by Sir John Romilly, M. R., in *Norris v. Wright*, 14 Beav. 291, I do not desire to be understood as sanctioning the propriety of trustees lending on second mortgages. If the taking of such securities is ever justifiable, it must be under peculiar circumstances, which ought to appear and to be manifestly sufficient to justify such a departure from a safe rule. No such circumstances appear in this case. The trustee deprived the fund of land, and acquired instead securities hazardous in their nature. There was nothing to constrain him to this course, nor to justify it. Therein he also, in my judgment, committed a breach of trust within the clause in question.

The case does not indicate that the trustee designed to make or has made any personal profit out of the transaction. I am convinced that he entered upon it with the hope that it would subserve the interest of the trust. But having, knowingly, taken improper risks, he ought not now to complain if the *cestuis que trustent* insist he shall make them good. It is not necessary to consider whether the advice of counsel would relieve a trustee, because the counsel here referred to was clearly not the counsel of the trustee, and the opinion said to be relied on was not one which justified reliance. But it could hardly be contended that advice of counsel would relieve from the consequences of an act known to be a breach of duty.

The other question (respecting the valuation of the lands with which the trustee is charged) I find to be difficult of determination. It is not insisted here that the rule adopted below, which was that the trustee was chargeable with the value of the land in the year 1871, when he conveyed it away, was erroneous. The contention is simply that the value was not so great as was determined below. The difficulty is in determining the value at that date. This arises partly because it is difficult to fix a standard of value for property of this kind and at a time long past, and partly because of the very meagre evidence presented on the subject. After a master's report, sustained on exception, we ought not to interfere, unless the decree is clearly wrong.

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The sales to Amelia Burnet Gilmore afford no aid in the solution of this question. It seems admitted that the consideration named in the deeds was largely in excess of the real value of the lands conveyed.

It appears that some of the land is low, and must be filled before being capable of being used for building purposes, for which alone it is said to be valuable. Some of it fronted on proposed streets, rendering it likely to become liable to assessments. Although nearly worthless for any purpose but building, there has been but one building erected on all the lots sold.

The trustee twice offered the lands for sale at auction about the time in question. He made actual sale of three lots only to two persons. The prices obtained approximate those fixed by the master. But he was unable to obtain bids for the other lots at prices more than half as great, although there was a numerous attendance. The other *bona fide* sales afford no criterion of value, for it appears the consideration was the debt of the *cestui que trust*.

From the evidence of the situation, quality and surroundings of the lots, and the sales and efforts to sell, there is not, in my judgment, sufficient to enable us to determine their value. The two sales are not sufficient to justify the deduction that the other lots were of relative value, in the face of the unsuccessful efforts to sell.

The opinion of three witnesses respecting their value was taken. The master adopted the opinion of one, and charged the trustee precisely what that witness testified the lots were worth. But his evidence was limited to a bare expression of opinion. He gave no reason, and testified to no fact, on which his opinion was founded. Such an opinion can have but little weight.

Another witness had been assessor in the locality in 1871 and the following years. He gives an estimate somewhat higher of the value. But, while he declares that his opinion was formed by other sales in the neighborhood, he does not describe those sales, nor compare the lands sold with those in question. He was not asked the valuation put upon the lands by him as

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assessor in the year 1871. But it appears in the case that lots adjoining such as he estimates to have been worth from \$500 to \$2,000 in that year, were assessed in 1876 at the uniform rate of \$100 per lot. If of like value (and that was the contention) so enormous a depreciation would seem to have called for some explanation.

The third witness, who, although he declared he was not an expert, was evidently such, gave reasons for his opinion and testified to facts on which it was founded. He compared these lots with tracts sold in the immediate neighborhood about the same time. These sales, in my judgment, form a better standard for the value of these lots than a sale of two of even adjoining lots, accompanied with persistent and unsuccessful efforts to sell others. The opinion of this witness seems to be further corroborated by the fact that the offers made at the auction sales were in almost exact accord with the prices he fixes.

Comparing the whole evidence, it seems to me that the opinion followed by the master, if any weight can be accorded to it, must be considered to be an estimate, not so much of actual value vested by the price one desirous of buying was willing to give, as of a speculative and imaginary value, which subsequent events have shown to have been illusory. As he supported his opinion by no reasons or facts, I think it ought not to have been adopted.

In this condition of the evidence I feel compelled to rely on that opinion which alone seems founded on facts which justify it, and which is otherwise corroborated. Taking that valuation, the trustee should be charged, for the value of the lots sold, the sum of \$5,332, instead of the sum which he was actually charged. The difference is large, but, as the evidence stands, I am unable to avoid the conclusion that its weight is in favor of the smaller sum.

The decree below ought, therefore, to be to this extent reversed, and the record remitted, that a new decree may be made in conformity with these views, as to the amount with which the trustee should be charged for the value of the lands conveyed by him in violation of his trust. In other respects the decree

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should be affirmed. This result entitles the trustee to costs in this court

Decree unanimously reversed.

JEREMIAH C. SWEENY, appellant,

v.

WASHINGTON B. WILLIAMS, receiver &c., respondent.

1. When, by statute, a right to administer relief, previously administered only by courts of equity, is extended to courts of law, the former courts are not thereby deprived of jurisdiction unless prohibitory or restrictive words are used in the statute; thenceforth the jurisdictions are concurrent.

2. When the jurisdictions are concurrent, a court of equity will not assume jurisdiction of a matter of which a court of law has already acquired cognizance, unless the latter cannot afford all the relief the party is entitled to.

3. Because a suit is pending at law, the defence to which is want of consideration not cognizable at law, a court of equity ought not to decline jurisdiction of a bill asking a perpetual injunction against the bond and against a mortgage securing the bond.

4. When a bond and mortgage, made without actual consideration as between the parties thereto, has been assigned to a third party, although the evidence does not satisfactorily show that it was executed with a pre-existing design or consent on the part of the maker that it should be so assigned, yet if the maker, by words or acts, afterwards assents to such assignment and ratifies it, the bond and mortgage are thereafter unassailable in the hands of the assignee. The proofs in this case show such assent and ratification.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Sweeny v. Williams*, 9 Stew. Eq. 459.

Mr. G. Collins, for appellant.

Mr. W. B. Williams, for respondent.

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The opinion of the court was delivered by

MAGIE, J.

The bill filed in this case prayed for a perpetual injunction restraining the respondent, as receiver of the Mechanics and Laborers Savings Bank, the said bank and one John Halliard, from bringing or maintaining any action against the appellant, who was the complainant, upon a certain bond and mortgage. The bond was dated November 1st, 1876; was made by appellant to said Halliard and was conditioned for the payment of \$10,000 on November 1st, 1879, with interest, and was secured by the mortgage, which was likewise made by appellant to Halliard, on lands which Halliard had simultaneously conveyed to him, and recited that it secured a part of the purchase-money. The bond and mortgage had been assigned by Halliard to said bank. These facts were averred in the bill, and appellant therein stated, as ground for the relief prayed, that the transaction between Halliard and himself was merely nominal and that no real interest was acquired by him in the lands conveyed to him, and no consideration existed for the bond and mortgage. It was also averred that an action had been lately before brought by respondent, as receiver, in the supreme court, against appellant, upon the bond. An injunction against proceeding in said action pending the suit in equity was also prayed.

Upon the advice of Vice-Chancellor Van Fleet, the bill was dismissed, and this appeal was taken.

In the opinion of the vice-chancellor it is intimated that the court of chancery might have properly declined jurisdiction in the case, on the ground that the relief claimed was available to the complainant as a defence to the action at law, and that nothing appeared to afford a reason for changing the forum of litigation. This intimation has been considered by counsel arguing before us as implying a doubt as to the jurisdiction of courts of equity in cases where the relief formerly afforded by those courts alone, may now by statute be afforded by courts of law. I do not understand the opinion as implying such a doubt, but if it is susceptible of that construction, it is in that respect erroneous.

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When courts of law have of their own motion extended their jurisdiction over cases theretofore solely cognizable in equity, the jurisdiction of the latter courts has been in no respect abridged, although when the jurisdiction at law has become well established, the equity jurisdiction has been in some cases declined. *Eyre v. Everett*, 2 Russ. 381; *Kemp v. Byor*, 7 Ves. 237; *Bromley v. Holland*, Id. 5; *Wells v. Pierce*, 27 N. H. 503; 2 Spen. Eq. Jur. § 693. When, by statute, a right to administer relief previously administered only by courts of equity is extended to courts of law, the jurisdiction of the courts of equity is undisturbed, unless prohibitory or restrictive words are used in the statute; thenceforth the jurisdictions are concurrent. This was the view expressed by Chancellor Green, in *Irick v. Black*, 2 C. E. Gr. 189, 199, and by Chancellor Zabriskie, in *Shotwell v. Smith*, 5 C. E. Gr. 79. Although questioned in the cases of *McGough v. Ins. Bank*, 2 Ga. 151, and *Riopelle v. Doellner*, 26 Mich. 102, the proposition is sustained by a great weight of authority. *Atty.-Gen. v. Aspinall*, 2 M. & C. 613; *Cannon v. McNab*, 48 Ala. 99; *Millsaps v. Pfeiffer*, 44 Miss. 805; *Case v. Fishback*, 10 B. Mon. 40; *Hall v. Hall*, 43 Ala. 488; *Wesley Church v. Moore*, 10 Pa. St. 273; *Bright v. Newland*, 4 Sneed 440; *King v. Payan*, 18 Ark. 583; *People v. Houghtaling*, 7 Cal. 348; *Crain v. Barnes*, 1 Md. Ch. 151; *Payne v. Bullard*, 23 Miss. 88; *Mitchell v. Otey*, Id. 236; *Clark v. Henry*, 9 Mo. 339; *Dobyns v. McGovern*, 15 Mo. 662.

But if there exist a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction after the jurisdiction of the courts of law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the court of law. *Story's Eq. Jur.* § 599; *Smith v. Smith's Admr.*, 3 Stew. Eq. 564; *Salter v. Williamson*, 1 Gr. Ch. 480; *Van Mater v. Sickler*, 1 Stock. 483; *Clarke v. Johnston*, 2 Stock. 287.

It is this proposition that I understand the learned vice-chancellor to have maintained in the opinion below. But I do not think the proposition was applied by him to this case, nor is it, in my judgment, properly applicable thereto. The com-

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plainant was entitled, if at all, to a relief broader than could be afforded him in the action at law. He asked, and if his contention is correct, was entitled to a perpetual injunction against the bond. At law, his relief as to the bond could be obtained only in case the plaintiff brought his action to trial. If he discontinued or submitted to a nonsuit, the relief could not be obtained there. The complainant was also entitled to relief on the whole transaction, including the mortgage securing the bond, a relief which would only be incidentally rendered by a successful defence at law, and to which Halliard was necessarily to be a party. Adequate relief was therefore not provided in the existing action at law. I think it indisputable that the court below had jurisdiction and a right to adjudicate on the merits of the case, as was done.

The conclusion reached on the merits was that the complainant was not entitled to the relief he sought. There was nothing erroneous in that result. The facts are fully set out in the vice-chancellor's opinion, and need not be repeated. He based his conclusion mainly on one of two grounds, viz., either that the bond and mortgage (admittedly without consideration as between the parties thereto) had been made by Sweeny with the express purpose of being assigned by Halliard to the bank, or that they were made by him with the purpose that Halliard should use them as he chose, and that he had in fact used them within the power so given by assigning them to the bank. My examination of the evidence has not convinced me that it is clearly proved that Sweeny made the bond and mortgage for the purpose of being assigned to the bank, or for the purpose of being used by Halliard by way of being assigned so as to be binding upon Sweeny personally. The evidence certainly raises strong suspicions that the latter was the intent with which the instruments were executed, but it perhaps fails to make it sufficiently clear to justify the decree on that ground.

But there is a ground, also adverted to by the vice-chancellor, on which I apprehend the result he reached is securely placed. It is, of course, conceded that if Sweeny had executed these papers with the express intent that Halliard should assign them

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to the bank for the purpose shown in the proofs, the receiver's claim upon them would be unassailable. Although the contract, as between the parties, was wholly without consideration, yet if made for assignment, and if assigned for a consideration, the latter became the consideration of the original contract. *Farnum v. Burnett*, 6 C. E. Gr. 87.

What Sweeny might thus effectively do by his previously expressed purpose and intent, he might likewise ratify with the same effect by his subsequent assent, express or implied. The evidence leaves no room for doubt that Sweeny, after he had notice that Halliard had assigned his bond and mortgage to the bank upon the latter's indebtedness, assented thereto and ratified Halliard's act. Sweeny was an officer of the bank. He was notified of the assignment shortly after it was made. He was informed that the interest was due, or about to become due, on the bond, and he was called on to pay it. He made no objection and did not deny his liability. On the contrary, he sought out Halliard and asked an explanation from him. According to his own statement, Halliard told him that he need not worry; that he (Haliard) "would take care of it." Thereupon he promptly paid the interest without disclosing the facts he now claims to be true. On receiving subsequent notices, he, once at least, repeated the payment. That he made the payments with money furnished by Halliard does not at all relieve him from the natural inference to be drawn from this conduct, which is that he assented to the act of Halliard in assigning this bond and mortgage, relying on Halliard to protect him from loss. There is some evidence of his knowledge that this bond was calculated as part of the assets of the bank on which a dividend was declared, with his assent as director. But without relying upon that, the conduct before mentioned amounted to a ratification of Halliard's act as effective in establishing the right of the bank as Sweeny's pre-existing consent would have been. On this ground it is that I think that the claim of the bank's receiver is not assailable.

The decree appealed from should therefore be affirmed, with costs.

Decree unanimously affirmed.

McDowell v. Perrine.

JAMES A. McDOWELL, appellant,

v.

WILLIAM H. PERRINE, respondent.

1. The petition to open a decree should state newly-discovered evidence.
2. A rehearing will not be granted if the evidence proposed to be offered be merely cumulative.
3. Mistake or error of judgment in counsel is no ground for rehearing.

On appeal from a decree of the chancellor, whose opinion is reported in *Perrine v. White*, 9 Stew. Eq. 1.

Mr. W. R. Gilmore, for appellant.

Mr. F. E. Marsh, for respondent.

The opinion of the court was delivered by

PARKER, J.

This appeal is from an order advised by the chancellor, dismissing the appellant's petition to open a final decree.

The affidavit accompanying the petition states in detail the testimony proposed to be offered should the decree be opened and the petitioner let in to defend.

The original bill was filed in 1881, by William H. Perrine, a judgment creditor of Mary White, the mother of the petitioner, for the purpose of setting aside as fraudulent two deeds of conveyance, which had been made by her to her son.

These deeds were executed after the debt for which Perrine obtained judgment was contracted.

McDowell, the petitioner, was made a party defendant in the suit, and he and Mrs. White (also a defendant) answered separately. He was not a resident of this state, but information of the pending suit was given him by his mother. Mrs. White

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swears that she was entrusted by her son with the care and conduct of the case in his behalf. She had the answer of McDowell prepared and sent to him. He signed and returned it to his counsel to be filed. This answer, which the petitioner says he read, shows clearly the nature and object of the bill of complaint. He could not read it without being made aware that the object of the suit was to set aside as fraudulent the deeds which his mother had executed to him, and to make the property described in those deeds liable to said judgment. That he did know that such was the object is proved by his denial in the answer that the conveyances were fraudulent, and by asserting therein that said judgment was not a lien upon said lots of land. He could not have failed to understand that evidence relating to the consideration of the deeds was of primary importance to him.

The answer having been signed and returned to his counsel, was filed on the 21st day of December, 1881, and from that time McDowell was a party in court.

Testimony in the cause was taken in the presence of his counsel, who examined and cross-examined witnesses in his behalf, and made argument for him at the hearing before the chancellor.

On the 22d day of March, 1882, the chancellor signed the final decree, which, after reciting that the cause had been heard on bill, answer, replication and proofs, in the presence of counsel for complainant and the defendants, adjudges the deeds to be void, and sets them aside as to the judgment and execution of complainant.

Soon after the decree was entered, Mary White, on behalf of herself and McDowell, filed a petition for rehearing. After argument the chancellor denied the application.

Afterwards another application to open the decree was made by McDowell alone, which, on advice of the vice-chancellor, was refused and the petition ordered dismissed. It was from the order last mentioned that this appeal was taken.

The affidavit of McDowell, attached to his petition, sets forth fully the testimony it is proposed to introduce should the decree be opened. In regard to the alleged consideration of the deeds and

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other material matters, it states substantially what was sworn to by Mrs. White in her evidence taken in the cause. It is the same statement with a little more particularity. It is merely an amplification of her testimony, which was considered by the chancellor when he made the final decree. It is not newly-discovered testimony. The evidence proposed to be taken is that of McDowell himself. He had knowledge of the facts attending the alleged transfer of the property at the time the depositions of the witnesses were taken in the cause, as fully as he now has knowledge of them.

The petition should set forth new facts or newly-discovered evidence of facts, which at the hearing were unknown to the party, and which could not have been known by the exercise of ordinary diligence prior to the closing of the evidence.

A rehearing will not be granted if the evidence to be offered is merely cumulative. *Dennett v. Dennett*, 44 N. H. 531; *Baker v. Whiting*, 1 Story 218; *Livingston v. Hubbs*, 3 Johns. Ch. 124.

But the principal reason urged by counsel of appellant to open the decree is that McDowell's counsel did not call him as a witness in the cause. Mrs. White says that when she suggested to his counsel to call McDowell as a witness, he replied that it would not be of any use or advantage to him, and that his testimony would do no good.

There is no evidence to lead to the inference that McDowell's counsel acted fraudulently in his management of the case. He may have made a mistake. In advising not to call McDowell as a witness, he may have erred in judgment. But he did not abandon the case. He examined witnesses, and argued the cause before the chancellor for the defendants.

McDowell was in court by his counsel. He had an opportunity to make his defence. He now comes to this court, and in effect says, My counsel should have had my testimony taken; he committed an error in not doing so; give me another chance and I think I can make out a better case.

Under the circumstances, the granting of a rehearing in this case would furnish a precedent which would lead to almost in-

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terminable litigation. After trial a party can almost always perceive where he might have made his case stronger. The adverse party has rights which should be recognized and protected. He should not be obliged to undergo the expense and delay of another contest because his opponent thinks his counsel made a mistake. The applicant for a rehearing must bring himself strictly within the rules which govern such applications.

It is well established that a client is bound by his counsel in his management of a cause, and the court will not grant another trial, because some witness was not examined, unless the conduct of the counsel was fraudulent. It matters not whether the omission to call the witness was caused by the belief of counsel that he had sufficient evidence already, or that the opposing party had failed in proof, or because the testimony, if taken, would probably not be credited.

In this case the refusal or omission to swear McDowell as a witness was an exercise of judgment on the part of counsel, which, if it proved to be an error of judgment, is not ground for rehearing.

Even where a party desires a certain course to be adopted, and counsel pursue another course, the party must abide by the acts of his counsel, however contrary to his wishes. *Hall v. Stothard*, 2 Chitty 267.

Counsel stand in place of the client. The mistake of a judge or a jury may be good cause for new trial, but not the mistake of counsel. *Queen v. Helston*, 10 Mod. 202.

Some of the authorities have gone so far as to hold that it is not sufficient ground for a bill of review that certain documents, on which complainant's right to a decree depended, were lost or mislaid by his counsel, and not found until after the decree against him. *Jones v. Pilcher*, 6 Munf. 425.

In *Franklin v. Wilkinson*, 3 Munf. 112, it is said that it is no ground for a bill of review that a party was prevented from proving certain important facts, by wrong advice of one of his counsel.

Error of judgment or mistake of law by counsel, as to the

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pertineney or force of evidence, furnishes no ground for rehearing. *Baker v. Whiting*, 1 Story 218.

In *Le Neve v. Le Neve*, 3 Atk. 26, 36, it is held that parties rely on the skill of their counsel, and therefore what counsel know must be allowed to be knowledge of the party.

A new trial will not be granted because a party failed to give other evidence, through his own or his counsel's mistake. *Gorgerat v. McCarty*, 1 Yeates 253.

The cases cited by counsel of appellant do not apply, because they show an entirely different state of facts. Upon full examination of the cases, it is found that there is no antagonism in the authorities.

In *Millspaugh v. McBride*, 7 Paige 509, the decree was obtained by default, and the defendant had been deprived of a defence on the merits.

In *Robson v. Cranwell*, 1 Dick. 61, the solicitor had received money to fee counsel at hearing; no briefs were put in, and the bill was dismissed because there was no appearance at the hearing for the complainant, through the action of counsel, which savored of fraud, and which the party could not anticipate.

In *Brinkerhoff v. Franklin*, 6 C. E. Gr. 334, the decree was opened where the party had not been heard, and where no laches on his part appeared.

In *Kemp v. Squire*, 1 Ves. Sr. 205, the party was an infant, and was beyond the seas until near the time of hearing, and the merits of the case were not before the court.

The case on which most reliance is placed by counsel of appellant is *Day v. Allaire*, 4 Stew. Eq. 303, decided in this court. In that case the defendant had answered under oath. The solicitor who had been retained refused to take certain testimony. He did not present to the court the evidence which had been taken, nor did he appear at the hearing to take part in the argument, although he had been fully paid, and only the complainant's case was heard. In fact, the solicitor abandoned the case and left the state without the knowledge of the client. In that case no error of judgment or mistake in law appeared on the part of counsel, but simple withdrawal from the case without the knowledge of

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the party, having the appearance of absolute bad faith, which could not be anticipated by the client.

The case now under consideration, as appears from what has been stated, is of a different character. The appellant's witnesses were examined and his case presented to the court by counsel. The chief complaint is that the appellant himself was not examined as a witness, because his counsel thought it unnecessary.

The order dismissing the petition is affirmed.

For affirmance—THE CHIEF-JUSTICE, DEPUE, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, COLE, GREEN, KIRK, WHITAKER—12.

For reversal—DIXON, PATERSON—2.

JAMES J. BERGEN, admr. of Caroline E. Van Liew, deceased,
et al., appellants,

v.

JOHN L. VAN LIEW et al., admrs. of Dennis Van Liew, deceased, respondents.

A husband and wife died within a few hours of each other, intestate and without issue. The wife had a separate estate and an income therefrom. A large sum of money in bank-bills was found, part in a pocket-book marked with the initials of the wife's name, part in another pocket-book marked with her father's name, also some gold coin in a bag, and some silver coin lying loose—all secreted in a trunk, marked with the wife's name, to which both had free access, the key usually being kept by the wife. Their deeds, bonds, notes, receipts, insurance policies &c. were also found in the trunk. There was no memorandum or other satisfactory evidence to show the amount contributed by either one to the money so found. *Held*, that it must be equally divided between their respective representatives.

On appeal from a decree advised by Vice-Chancellor Bird, whose opinion is reported in *Van Liew v. Galtra*, 9 Stew. Eq. 251.

Van Liew v. Van Liew.

Mr. R. V. Lindabury and *Mr. J. J. Bergen*, for appellants.

Mr. John Schomp, for respondents.

The opinion of the court was delivered by

GREEN, J.

The controversy in this cause arises between the representatives of the husband and the representatives of the wife, respecting the ownership of a sum of money found after their death in the house where they had resided together as man and wife for over thirty years. They died within eighteen hours of each other, without issue, and intestate, the wife being the survivor.

The money in dispute is represented by a certificate of deposit for \$5,441.48, issued by the National Iron Bank at Morristown, payable to the order of Thomas Galtra and J. L. Van Liew, the first-named a brother of the wife, the other of the husband, who together counted the money and deposited it in the bank after the death of their deceased relatives, and before the grant of administration in either case. Of this fund the sum of \$168 was found part in the bar and part in a small box, where it had been placed by a servant, who took charge of it at the request of the husband during his last sickness. Respecting this part of the fund, there can be no contention, as it was clearly the property of the husband, and must go to his representatives.

The residue of the money represented by the certificate, and the only subject of controversy, amounting to \$5,273.48, was found in a trunk marked on "the tray," called by the witnesses "the till," with the wife's name, and which was kept in a small room or closet, known as the clothes room, where the clothing of both parties and the bedding used in the house appear to have been stored. The keys both of the trunk and closet were usually kept by the wife, though it appears by the evidence that the husband obtained and used them at will.

The money found in the trunk is claimed by the representative of the wife upon the ground that it was in her separate and personal possession; that it was kept in her trunk, and that the ownership and possession of the trunk drew after them a pre-

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sumption of the ownership of the contents and establish a *prima facie* title to the money. The representatives of the husband rest their claim upon the broad ground that the possession of the wife, whether separate or in common with the husband, is the possession of the husband, and that from such possession the law presumes ownership in the husband.

The latter view was adopted by the learned vice-chancellor in the court below (see 9 *Stew. Eq.* 251), and the decree appealed from directs the whole fund to be paid to the representatives of the husband.

Both parties, it may be observed, claim title by possession, and each relies almost exclusively upon the alleged nature of the possession and the presumption of ownership arising from it.

The possession of personal property has always been recognized as presumptive evidence of ownership. At common law as between husband and wife this presumption had no existence. As an incident to the marital relation, the possession of the wife was the possession of the husband, and presumptive evidence of ownership in him and not in the wife.

But since the passage of the laws for the better securing of the property of married women, and the liberal construction given to those laws by our courts, the presumption of ownership by the husband of property in the possession of the wife exists only in a modified form and to a limited extent. The sole and separate property of the wife in both her real and personal estate, and the rents and profits thereof, as well as in her wages and earnings, is now recognized by law, and there seems no sufficient reason for excluding her from the operation of general rules of law as to what shall constitute the evidence of her ownership of the property, which the law gives to her. *Whiton v. Snyder*, 88 N. Y. 299. When the law declares that the goods of the wife shall be her sole and separate property, as though she were a single woman, it is incongruous to hold that the possession by the wife of property absolutely her own is presumptive evidence of the ownership of that property by the husband.

As between the wife and third persons, the general rules of evidence which protect the husband should in substance be made

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available for the protection of the wife. 2 *Bishop on Married Women* § 140. Such general rules, however, must, as to their application in controversies between husband and wife, be modified by the peculiar relations existing between them, as well as by the facts in each particular case and the circumstances surrounding it. Mr. Bishop, in his treatise, well observes, "that it is plain in reason that where husband and wife are living together, and using each other's property almost indiscriminately, and then a controversy arises between them as to ownership, little or no weight should be given to the mere fact of possession."

It appears from the evidence in the cause, that the trunk in which the money in controversy was found, although marked with the wife's name, was the common receptacle of the valuables of both husband and wife, there being no safe or other place of deposit for such articles in the house. In the trunk were found (besides the money) a few articles of clothing, two watches, the husband's title deeds, policies of insurance, securities and receipts; also the wife's separate securities, consisting of bonds, mortgages and notes. The bonds, mortgages, and securities of both parties were tied together in one package. The money consisted of United States notes, bank bills, fractional currency, gold and silver coin and nickels.

Of the notes and bills (which were principally in packages with paper bands around them, as if carefully counted) \$2,655 was found in a pocket-book marked on the inside with the initials of the wife's name, and \$670 in a pocket-book marked with the name of her father; the sum of \$1,307.50 in gold coin was in a bag by itself; and of the silver, some was in bags, and some, with the nickels and a few gold coins, lying loose in the bottom of the trunk.

The evidence further shows that the parties lived most amicably together upon the best of terms, and that they both had access to and exercised a common control over the common depository where their valuables were concealed. The husband kept a country tavern, in the management of which he was assisted by his wife, and from the profits of which they derived

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their living. The wife had for several years a small separate estate, from which she received some income. They were of parsimonious habits, reserved dispositions, timid about investments, and, so far as can be ascertained, they made the trunk in question a place of deposit for their common savings, as well from the business of the husband as from the separate income of the wife.

Under these circumstances, there is no presumption of separate ownership either in husband or wife from possession. The only fair and reasonable inference is that the moneys of these parties were mingled together in the trunk with the knowledge and assent of both. There is no allegation or pretence of fraud in either party, or that the commingling was the result of negligence, inadvertence, or accident.

It is the undisputed rule both of the civil and the common law that where the goods of two or more persons are so intermixed that they can no longer be distinguished, the owners, if the intermixture be by consent, have an interest in common in proportion to their respective shares. *Inst.* 2, 1, 27, 28; 2 *Bl. Com.* 405; 2 *Kent* 364; *Story on Bailments* § 40.

This then is the case of a common fund, from which both parties were entitled to take out their respective contributions, and the representatives of each have now the same right, provided the several contributions of their respective intestates to the common fund can be definitely ascertained. But upon this vital point the case presents no satisfactory testimony, and the little we have is of a negative rather than a positive character.

It is clear that both parties were in receipt of funds peculiarly their own, the husband from the profits of his business, the wife from the income of her separate estate, and that both had access at will to the only depository in the house for their valuables and money. But so secretly was that depository visited, and so carefully was the hoarded treasure guarded, that the very fact of its existence was neither known nor suspected by the nearest relatives of either husband or wife. No human eye saw a single dollar either placed in the trunk or withdrawn from it, though the weight of testimony is to the effect that the wife ordinarily acted as custodian, keeping the keys, and on several occasions

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receiving money from her husband and procuring it for him at his request when needed.

The mouths of both parties are closed in death. No account or memorandum of any kind was found in the common receptacle or elsewhere to show their respective contributions to the fund, or to serve as a basis for its division. We have no data whatever for estimating the amount either of the husband's income or his savings. As showing the extent of the wife's interest in the fund, it is reasonably clear that she received from her father's estate \$861.42 in cash, which remained uninvested, she having no other securities at her death than those originally received by her. She further received on her securities about \$300 of interest. And before she received any part of her separate estate, the husband requested a neighbor to have exchanged for his wife between \$200 and \$300 of Somerset Bank money, making an aggregate of about \$1,400 shown to have belonged to the wife. Beyond this, all the evidence tending to show ownership of the wife is vague and uncertain. There was an attempt to prove that she participated to some extent in the profits of the business, in that her husband on several occasions handed her pieces of gold, but whether they were intended as gifts or were delivered to her as the husband's agent to put safely away, does not appear. So also the alleged handing of a bag of gold to the wife, with the remark, "This is yours, Liz; this is what I owe you"—when the money was not counted, nor the amount stated, nor a receipt given, nor the nature of the debt mentioned, nor does it appear that the bag was even opened in the presence of the witness, so that the contents might as well have been in reality silver, or nickels, or copper, as gold.

There being thus no satisfactory evidence of the amounts respectively contributed by the parties to the common fund, and no certain basis for its division, and each equally culpable for not keeping some account or statement of their respective interests, the only equitable solution of the difficulty is the equal division of the fund in controversy. This view of the case is further supported by the following considerations:

Where two persons hold either real or personal estate in joint

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tenancy or in common, the presumption, in the absence of evidence to the contrary, is that they hold in equal shares or moieties. If two persons are shown to be partners they are presumed to share equally in profits and losses until the contrary be shown.

The commingling of goods by consent necessarily presupposes some agreement or understanding between the parties as to the terms upon which the intermingling was made. It may reasonably be inferred from the relations between these parties, from the manner in which they lived, from their confidence in each other, and from the fact that neither kept any account or statement of the transactions, that the parties themselves considered this a common fund in which each had an equal interest and to which each contributed about an equal share. Probably no division was ever contemplated or thought of by either.

The fact that \$2,655, being \$18 only in excess of a moiety of the fund in dispute, was found in a pocket-book marked with the initials of the wife's name, was urged as evidence having some weight, though certainly very slight, in favor either of giving the wife that amount or making an equal division.

The equal division of the fund is also sanctioned by the familiar maxim that "Equality is equity." The fund belongs to two parties. There is no certain or satisfactory basis for a division of the mass upon any other principle, and an equal division will best subserve the ends of justice and violate no settled rule of law.

The decree should be reversed and the record remitted with instructions for a division of the fund in accordance with the views above expressed, each party to pay his own costs both in this court and in the court below.

Decree unanimously reversed.

Sargent v. Sargent.

MARTHA A. SARGENT, appellant,

v.

AUGUSTUS G. SARGENT, respondent.

1. That a wife, after her dissolute husband had left her, contributed periodically to his support for more than three years, is not, of itself, sufficient evidence of connivance to prevent her obtaining a divorce for his desertion.

2. Where a husband deserts his wife, without cause on his part and without fault on hers, there is not the same obligation on the wife to endeavor to effect a reconciliation that there would be on the husband were the case reversed.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Sargent v. Sargent*, 6 *Stew. Eq.* 204.

Mr. F. McGee, for appellant.

The opinion of the court was delivered by

PATERSON, J.

This cause comes up on an appeal from a decree filed in the court of chancery on the 29th day of May, 1882, denying the relief sought by the bill of complaint, and directing that it be dismissed. The proceedings are *ex parte* in their nature, and the facts of the case are stated in the opinion of the vice-chancellor who advised the decree.

There is no difference as to those facts, nor any doubt affecting their credibility; they are assumed to be correct. The decree below is based upon the finding that the evidence fails to establish such a desertion on the part of the husband as is contemplated by the statute. Was that willful, continued and obstinate for the term of three years? If not, it must be because

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a clear case of consent or collusion between the parties appears from the depositions.

That the defendant was absent from and did not live in marital relations with his wife for more than the period required by the words of the statute, does not admit of any dispute. It is just as evident that he went away without saying anything to such effect, and never returned to live with the complainant again. All his actions show he did not intend to do so. His wife made little or no effort to ascertain what had become of him. Incidents like these are not uncommon developments in the history of such cases. Their significance in warranting a refusal or denial of judicial relief, must depend upon their connection with other matters disclosed by the testimony in each instance. Here there was no reason why the wife should seek out the husband particularly and induce him to return to a home to which, most certainly, he could not have been a very desirable ornament. As she was human, she would not permit him to be in want while he was continuing the same dissolute habits and course of life.

The testimony does not disclose the slightest verbal agreement on the part of the complainant to act in collusion with the defendant. Such an inference is strained in character, based on surmise only, and not warranted by any reasonable interpretation of the facts. Had the parties intended to establish a case in that way, it is not probable they would have been permitted to reveal the arrangement by which the defendant received assistance from his wife after desertion. As that is stated in the depositions, when considered with the facts of the case, it is entirely natural, and is a credit, and not a discredit, to the complainant. The medium of assistance was a former partner in business with the defendant, and the latter could appeal to him with some hope of claim. It does seem as if this incident should preclude, and not be made the foundation on which to raise up an inference of collusion.

In the absence of any direct proof of preconcerted arrangement between the parties, the presumption upon which an inference of an unfavorable nature is drawn should be clear, exceptionally so, and no such presumption appears in this case.

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From the facts, it would seem to be a proper one for relief, and the decree below should be reversed.

There is another reason why that decree should not stand. The marital relation is recognized, both legally and morally, as imposing obligation pre-eminently on the husband. Society, so far at least, has regarded the duty of the latter in maintaining and preserving those relations as of the superior order. This may or not be modified in the future. Not that the tie is more sacred or less binding on the part of the wife, but where the act of desertion occurs without reason on his part and without fault on her side, the same efforts to restore harmonious relations are not expected from her as would be from him, if the case were reversed. The principle that the integrity of the matrimonial tie requires this of the husband, is stated clearly by the chancellor in *Schanck v. Schanck*, 6 *Stew. Eq.* 363, and must command general assent.

A decree should be entered in this case granting the prayer of the bill of complaint.

Decree unanimously reversed.

NICHOLAS DERBY, appellant,

v.

THE NEW YORK FIRE INSURANCE COMPANY, respondent.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *New York Fire Ins. Co. v. Tonker*, 8 *Stew. Eq.* 408.

Mr. A. Zabriskie, for appellant.

Mr. G. D. W. Vroom, for respondent.

Putnam v. Clark. Cornell v. Levinson.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the vice-chancellor.

ADAH A. PUTNAM, appellant.

v.

LYDIA A. CLARK et al., respondents.

On appeal from a decree of the chancellor dismissing appellant's petition. The chancellor's opinion is reported in *Putnam v. Clark*, 9 Stew. Eq. 33.

Mr. C. H. Hartshorne and Mr. C. Parker, for appellant.

Messrs. Collins & Corbin, for respondents.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the chancellor.

ALBERT CORNELL et al., appellants,

v.

MICHAEL LEVINSON et al., respondents.

On appeal from a decree of the chancellor, on the following opinion.

Mr. W. M. Scudder and Mr. C. F. Hill, for appellants.

Mr. Samuel Kalisch, for respondents.

Cornell v. Levinson.

The controversy between the parties to this suit is in reference to \$1,498.82, paid into the supreme court of this state by the sheriff of Essex county, or still held by him, as the proceeds of the sale (less his fees) of the goods of Herman Lissner, of Newark, under an execution issued on a judgment for \$8,315.83, recovered against him on *cognovit* in that court by Michael Levinson, June 17th, 1880. The sale took place at Newark on the 28th day of June and 8th of July, 1880, to which latter day an adjournment was made by the sheriff, in view of a claim of property made as to some of the goods against which Levinson indemnified him. The complainants are judgment-creditors of Lissner. The judgment of Cornell & Amerman is for \$184.75, and was recovered June 21st, 1880, in the second district court of Newark; that of Harbison, Shiner & Loder was recovered in the first district court of Newark, June 23d, 1880, for \$133.82. Executions were issued on both these judgments, and that which was issued on Cornell & Amerman's was levied on the goods on the 21st of June, 1880, and the other two days afterward—both before the first day of sale. Levinson's suit was begun by summons, returnable June 14th, 1880, the declaration was filed therein on the 16th, the judgment entered on a *cognovit* the next day, and a levy under it made on the 21st. The goods were a stock of millinery and fancy goods. Levinson is the brother-in-law of Lissner. Between the levy under Levinson's execution and the sale, Lissner, by consent of Levinson, continued in possession of the goods and went on to sell them as he had done before the levy. At the sale the goods were put up in large lots. One Henry Obendorfer, who at the time was assisting Levinson's firm (L. Levinson & Co.), of the city of New York, in part of their business (he appears to have been a man of means), became the purchaser of all or very nearly all the goods, through bids for himself or others who bought for him, or whose purchases he took. If there was any exceptance it was very insignificant. After the sale, Obendorfer claimed to be the owner of the property, and Lissner and his wife (who is Levinson's sister) continued in possession of the store, and under an agreement with Obendorfer, carried on the business with the goods, and others

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subsequently purchased, until the latter part of February, 1881, when Obendorfer removed the stock from Newark. By the agreement between Lissner and his wife and Obendorfer, the former were to receive for their compensation \$25 per week (\$15 for Lissner and \$10 for his wife), and five per cent. on the amount of the sales.

The complainants seek to restrain Levinson from receiving the money derived from the sale of the goods on the ground that his judgment was fraudulent, and was intended as a means of protecting Lissner's property from his creditors.

The proof of the indebtedness for which the judgment was confessed is clear. It was for money lent by Levinson to Lissner, and money paid by the former for the latter and interest, and the price (comparatively a very small amount) of goods sold and delivered by Levinson to Lissner. It is urged on behalf of the complainants, however, that the checks for the money alleged to have been lent and paid were given not by Levinson, but by his firm, L. Levinson & Co., and that the goods, the price of which, as before stated, constitutes a very small part of the debt, were the property of that firm, or in other words, that the indebtedness for which the judgment was recovered was not due from Lissner to Levinson, but to his firm. But it is quite manifest that the debt was in fact due to Levinson. Though the firm furnished the money and goods, they were furnished by Levinson, who was to account to them therefor. It is also urged that a claim of \$500, which constituted part of the indebtedness, was for money lent, not to Lissner, but to another person, to be lent by him to Lissner. It appears, however, that the loan was, in fact, to Lissner, and that he was the true debtor and Levinson the real creditor. Objections are made to other items of Levinson's claim, but the evidence in regard to them by no means leads to the conclusion that they are not claimed in good faith, nor, indeed, that they are just debts from Lissner to Levinson. There is no reason to doubt the *bona fides* of the claim for which Levinson's judgment was recovered.

The complainants insist, also, that the conduct of Levinson, in leaving the goods in the hands of Lissner after the levy, is evi-

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dence of fraud. But it is proved that the latter accounted to the former for the money received from the sales during the few days which intervened between the levy and the sale, and paid to him \$574 as the net proceeds. And so, too, although after the sale Lissner continued in possession, it was under an express agreement with Obendorfer, for the services of him and his wife in the employ of the latter for wages explicitly agreed upon, and the business appears to have been, in fact, conducted by Lissner and his wife for Obendorfer, on his credit and on his account, after the sheriff's sale. The circumstances relied upon by the complainants as proof of fraud do not lead to the conviction that the Levinson judgment was fraudulent, or was entered with a fraudulent design or purpose. It appears, undeniably, that Levinson had from time to time lent to Lissner, and advanced and paid for him large sums of money from a period as early as 1873, when he advanced \$10,000 for him in a business in Illinois. The moneys lent and paid, for which the judgment was recovered, were advanced between January 5th, 1878, and March 8th, 1880, and they amounted altogether to \$9,374.85 (the claim, with the amount of the price of the goods sold, was \$9,385.85), and Lissner had paid only \$1,149.63, leaving a balance of \$8,236.22. Of the money lent, \$1,400 were lent January 2d, 1880, in two loans—one of \$400 and the other of \$1,000; \$1,000 on the 7th of the same month, and \$600 on the 20th. When application was made to Levinson by Lissner, in March following, for another loan of \$500, he appears to have refused, but subsequently yielded and lent him the money. Lissner's books contain evidence of the indebtedness, and the checks on which the money was paid are produced. Lissner's bank-book shows that he made a deposit to his credit of the sum of \$1,000 on the 2d of January, 1880, and another one of the same amount on the 7th. There is no ground on which Levinson should be restrained from receiving the proceeds of the goods, which are not enough to pay one-sixth of the amount of the judgment, and not enough to pay that part of it about which there is no room for controversy, except as to who is the real creditor, Levinson or his firm, which has been considered in a

Clark v. Bradshaw.

previous part of this opinion. . The bill will be dismissed, with costs.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the chancellor.

CHARLES CLARK, appellant,

v.

REBECCA BRADSHAW, respondent.

On appeal from an order overruling exceptions to a master's report, advised by Vice-Chancellor Bird.

Mr. P. L. Voorhees, for appellant.

Mr. D. J. Pancoast, for respondent.

PER CURIAM.

This order affirmed

For affirmance—THE CHIEF-JUSTICE, DIXON, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN, PATERSON, WHITAKER—13.

For reversal—KIRK—1.

INDEX.

A.

Advancement

Lands of a decedent were ordered to be sold in partition and the proceeds divided among his four surviving children and two grandchildren, who were to take the share of their father, decedent's son Benjamin, who died after his father. Benjamin, whose estate is insolvent, was indebted to his father \$10,000 for moneys advanced, and had given notes and a mortgage therefor.—*Held*, that Benjamin's declarations to third persons that he supposed his indebtedness to his father's estate would be deducted from his share thereof, were not sufficient to off-set that indebtedness against his children's share of the lands. *Green v. Hathaway*,

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Agent.

See MORTGAGE, 5; TRUSTS, 2-7.

Alteration.

See EVIDENCE, 2.

Appeal.

1. Where a cause had been heard before only ten of the fifteen judges, and the decree below was sustained by an equal division of the court, a re-argument before the full bench was ordered. *Summerbell v. Summerbell*,

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2. The cases in this court which hold that, on appeal from an order refusing a preliminary injunction, the case must be heard, on the appeal, on the same facts that were before the court of chancery, do not deprive this court, on the hearing of the appeal, of the right to exercise that discretion upon which the allowance or refusal of an injunction rests. *Terhune v. Midland Railroad Co.*,

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3. When, upon a *caveat* against the probate of a will, the orphans' court certifies the questions involved to the circuit court for trial by jury, pursuant to section 19 of the orphans' court act (*Rev. p. 756*), and on the coming in of the finding the orphans' court decrees accordingly, an appeal to the ordinary opens for consideration not merely the propriety of the decree, but the

Appeal—Continued.

right to probate of the will. On such appeal, the ordinary may decide the question on the evidence before the jury, or on additional proofs taken in accordance with the practice of the prerogative court. *Rusling v. Rusling*,

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See EXECUTORS, 9; INJUNCTION, 1; PRACTICE, 5.

Assignment for Creditors.

See FRAUDULENT CONVEYANCE, 5.

B.**Bill of Review.**

Leave to file a bill of review, on the ground that the complainant has, since decree, discovered the whereabouts of a material witness, of whose existence and materiality she knew when she began her suit, denied on the ground of laches, and the impolicy of allowing a renewal of the litigation. *Putnam v. Clark*,

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Bank.

See PARTIES, 4, 5.

Bona Fide Purchaser.

1. The defendant in a judgment which had been paid off but not canceled of record, *bona fide* negotiated a sale of it as a valid judgment to a *bona fide* purchaser for value, without notice, to whom the plaintiff in the judgment assigned it, covenanting that the whole of the money for which it was recovered was due. The holders of a subsequent judgment brought suit to compel cancellation of the judgment, on the ground that it was paid off when the assignment was made.—*Held*, that equity would not aid them, the purchasers having bought in good faith, for value and without notice. *Traphagen v. Hand*, 384
2. The doctrine which validates securities of a corporation within its apparent powers, but improperly, and therefore illegally, issued for the want of acts to be done by the corporation or its officers in the management of its internal affairs, applies only in favor of *bona fide* holders for value. A person who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled, is not protected, and in his hands the security is invalid, though the imperfection is in some matter relating to the internal affairs of the corporation, which would be unavailable against a *bona fide* holder of the same security. *Leggett v. N. J. & M. Banking Co.*, Sax. 542, explained. *Hackensack Water Co. v. De Kay*,

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See MORTGAGE, 6.

Bonds.

See CORPORATIONS, 8; INJUNCTION, 4; JURISDICTION, 7; PARTIES, 10; TRUSTS, 12.

Bridge.

The statute of 1874 (*Rev. p. 87 § 13*), providing that navigation in certain cases may be obstructed, does not authorize the owners of a bridge over a navigable stream to close the draw of their bridge so as to stop navigation entirely, unless the work required to be done to their bridge is of a nature or character which cannot be done properly and with reasonable dispatch with the draw open. *Lister v. Newark Plank Road Co.*,

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Broker.

A mortgage was given by a married woman, on her own lands, to secure the payment of \$11,000, representing, partly, moneys due the mortgagee, a stock-broker, for losses theretofore incurred by the mortgagor's husband; partly, similar losses incurred on the mortgagor's own account, and partly, to secure any further advances, not exceeding \$4,000, which the mortgagee might make on account of subsequent stock speculations of the mortgagor through the mortgagee.—*Held*,

(1) That the mortgage was a valid security for so much of the consideration as represented the husband's debt to the mortgagee.

(2) That it was also valid for so much as represented the mortgagee's losses incurred in *bona fide* purchases or sales of stock by the mortgagee for account of the mortgagor, and at her request, including commissions, interest and premiums for money used in carrying her stock.

(3) That a stipulation by the mortgagee that he would not "assign or dispose of the mortgage until his future advances, amounting to \$4,000, had actually been made," would not prevent his foreclosure of the mortgage for the sum actually advanced and due thereon, although such advances did not amount to \$4,000. *Baldwin v. Flagg*,

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C.

Cases Criticised.

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Charity.

1. A bequest of a fund in trust, the annual interest thereof to be employed by designated trustees for "the relief of the most deserving of the poor of the city of Paterson aforesaid forever, without regard to color or sex, but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund"—*Held*, valid as a charitable use.
 Hesketh v. Murphy, 304
- See WILL, 9.

Chattel Mortgage.

See MORTGAGE, 4; PARTNERSHIP, 3.

Condition.

See CORPORATION, 8; WATER RIGHTS, 1.

Constitution.

The act of 1881 (*P. L. of 1881 p. 184*), which provides that where a debt is secured by a bond and mortgage the first proceeding to collect the debt shall be by the foreclosure of the mortgage, and that the foreclosure and sale of the mortgaged premises shall be opened and the property be subject to redemption on payment of the decree, in case a judgment shall, after the foreclosure and sale, be recovered on the bond for the balance of the debt, is unconstitutional as applied to antecedent obligations. *Coddington v. Bispham*, 574

Art. I. § 16, 340

Art. VI. § 4 ¶ 3, 604, 606

Contempt of Court.

See JURISDICTION, 1.

Contract.

See CORPORATION, 2; FRAUDS AND PERJURIES, 1.

Corporation.

1. The directors of a railroad company, without any authority either by statute or charter, passed a resolution to assume certain debts and to buy a majority of the stock and bonds and the equipment of a rival railroad. The resolutions also provided for the calling of a special meeting of the stockholders to vote upon the matter, and it was not to be carried out without their approval.—*Held*,
 - (1) That the proposed purchase was *ultra vires*, and hence could not be executed even if ratified by the stockholders.
 - (2) That it was void and against public policy, in that its object was to prevent lawful competition. *Elkins v. Camden & A. R. R. Co.*, 5
2. A contract between two connecting railroads for the division of earnings, according to the distance which each corporation shall have carried the passenger or freight for which the money is paid, is within the discretionary powers of the directors, and its execution cannot be enjoined at the instance of a stockholder, who does not show a dishonest or fraudulent purpose on the part of the directors in making such contract, and that he will be injured thereby. *Elkins v. Camden & A. R. R. Co.*, 241
3. A stockholder applied for an injunction to prevent the execution of a contract between connecting railroads, for the division of earnings on freight and passengers carried over such roads, making only the company of which he was a stockholder, a defendant.—*Held*, that the other railroad company with which the proposed contract was to be executed, was a necessary party. *Id.*, 241
4. Under the first section of the act concerning the sale of railroads, canals &c., a purchaser of railroad property and franchises at a judicial sale is empowered to take and hold the purchase in a corporate capacity; and when so held it is liable to be seized and sold for corporation debts only. *Boylan v. Kelly*, 331
5. Where the charter of a corporation provides that annual meetings for the election of directors shall be held by the stockholders, the directors cannot by a by-law so change the time of holding the annual election that they will continue themselves in office more than a year, against the wishes of the holders of a majority of the stock. *Elkins v. Camden & A. R. R. Co.*, 467
6. As in favor of creditors and third persons dealing with a corporation in good faith, the regularity and validity of its organization, effected under color of its charter, cannot be impeached, and the acts of its officers, who are officers *de facto* under color of an election, are binding upon the corporation. *Hackensack Water Co. v. De Kay*, 543
7. In some cases an obligation made by a corporation is validated

Corporation—Continued.

by the fact that the corporation has had a benefit under the contract, from which arises an obligation to pay the debt in common with other debts, but where a creditor claims a mortgage security which gives him a lien on the property of the corporation in priority over other creditors, he cannot maintain his security unless he establishes the validity of his mortgage as an encumbrance, which the corporation had power to make. *Id.*,

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8. Persons dealing in the negotiable securities of a corporation are chargeable with notice of the power of the corporation to make such securities as conferred by its charter. If the power granted by the charter is subject to a condition relating either to the form in which such securities shall be made in order to be valid, or relating to some preliminary proceedings extraneous to the acts of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defences in consequence thereof, even in the hands of *bona fide* holders. *Id.*,

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9. But this doctrine does not prevail in those instances in which the right to issue such securities is by the charter conditioned upon the performance of acts by the corporation or its officers, relating to the management of the affairs of the corporation. In such cases, if a person dealing with the corporation finds the acts to be within the scope of its powers under its charter, he has a right to assume that all such conditions have been complied with. *Id.*,

549

10. The Hackensack Water Company was incorporated in 1869, with a capital of \$50,000. The charter provided for an organization as soon as \$20,000 of the capital stock should be subscribed and paid in. In 1873, the corporation was organized and directors elected. Very little of the stock had then been subscribed, and less of it had been paid in. The directors were not qualified for the office, and were irregularly chosen. Under this organization, the company bought and took title for lands in its own name, constructed its works, acquired property to a considerable amount, and contracted debts to a larger amount. On a bill to foreclose a mortgage made by the corporation—*Held*, that the corporation was a corporation *de facto*, and its directors officers *de facto*, and that the acts of the latter were binding on the corporation. *Id.*,

549

11. The charter authorized the company to increase its capital to \$100,000. The charter also empowered the company to borrow money not exceeding two-thirds of the capital paid in, and to secure the same by bonds and a mortgage upon its property and franchises. In August, 1873, a resolution was passed to increase the capital to \$100,000. In September,

Corporation—Continued.

1873, the directors adopted a resolution that one hundred and thirty-three bonds, of \$500 each, be issued, payable to a trustee or bearer, with coupons for the semi-annual interest. The bonds authorized by this resolution, and in fact issued, amounted to \$66,500, nearly two-thirds of the capital authorized when increased. At that time not over \$2,000 of capital had been paid in. In a suit to foreclose a mortgage made in pursuance of this resolution, duly executed under the corporate seal—*Held*, that the mortgage, being within the powers granted by the charter, and on its face having the appearance of being within the company's power to mortgage, was a valid security in favor of *bona fide* holders of the bonds, notwithstanding the directors acted illegally in making the mortgage and the bonds, and putting the bonds in circulation without first obtaining subscriptions to the capital to be made and paid in sufficient in amount to justify them in making the mortgage. *Id.*, 549

See ESTOPPEL, 2, 3; INJUNCTION, 3; INSURANCE, 1; JURISDICTION, 4; MORTGAGE, 4; PARTIES, 1, 5; PLEADING, 13.

Costs.

1. A next friend is entitled to be re-imbursed out of the estate of the person in whose behalf he sues, though his suit is unsuccessful, if it appears that he acted in good faith and with reasonable caution, and simply with a view to protect a person who was unable to protect himself. *Voorhees v. Polhemus*, 456
2. On dismissal of the bill no costs were awarded; none to testator's brother, who answered, because he ought to have demurred; nor any to the son (for whom a formal answer was put in by his guardian *ad litem*), because the suit is presumed to have been brought on his behalf. *Walker v. Walker*, 377

See EXECUTORS, 7; SHERIFF, 1; TRUSTS, 11.

D.**Deed.**

1. In the absence of proof to the contrary, the presumption is that a deed for lands was delivered on the day it bears date. *Halsey v. Ball*, 161
2. A deed which describes the land conveyed by it as beginning at a point on the side of a street, and thence running along the street, will, if the grantor owns the street, pass the land to the centre of the street, but such, of course, will not be its effect if the land described as a street is owned by some other person than the grantor. *Comrs. v. Johnson*, 211

See EVIDENCE, 2; MORTGAGE, 1, 10; NOTICE, 9; UNDUE INFLUENCE, 3.

Descent.

1. By the sixth clause of the statute of descents, a great-uncle of an intestate is of equal degree of consanguinity with a cousin of such intestate. *Smith v. Gaines*, 297

Divorce.

1. Alimony and counsel fees were originally allowed in divorce suits, because the wife was without other means of support, or of obtaining the money necessary to defray her expenses in the suit. *Westerfield v. Westerfield*, 195
2. When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either. *Id.*, 195
3. In a suit for divorce, for adultery, a decree should not be granted on the uncorroborated evidence of a witness standing to the parties in the relation of an accomplice. *Whitenack v. Whitenack*, 474
4. Where the conduct of a defendant in a suit for divorce admits of two interpretations, equally consistent with probability, one involving guilt and the other consistent with innocence, the court should always adopt that which favors innocence. *Id.*, 474
5. A petitioner asking for divorce, on the ground of desertion, will not be entitled to a decree if it appears that at any time during the continuance of the statutory period he consents to the desertion. *Grant v. Grant*, 502
6. If the separation was caused by the cruelty of the husband, inflicted not in the exercise of any marital right, such cruelty is a continuing bar. *Id.*, 502
7. If it appears in such case that during the separation his affections have been given to another, this is also a bar. *Id.*, 502
8. That a wife, after her dissolute husband had left her, contributed periodically to his support for more than three years, is not, of itself, sufficient evidence of connivance to prevent her obtaining a divorce for his desertion. *Sargent v. Sargent*, 644
9. Where a husband deserts his wife, without cause on his part and without fault on hers, there is not the same obligation on the wife to endeavor to effect a reconciliation that there would be on the husband were the case reversed. *Id.*, 644

Dower.

See LEGACY, 1.

E.**Easement.**

1. A strip of land, running over and along the defendant's lot, had been used, without dispute, for forty years as an alley, and was

Easement—Continued.

the only means of access to complainant's lot from the public street of a city. In building an addition to his house in 1871, the defendant built over the alley, leaving sufficient space for its ordinary use, and also put a side door in the addition, opening into that part of the alley which he built over.—*Held*, that defendant had no right to close the alley so as to cut off the use of it by complainant, and that complainant's easement was not affected by a proposition to the defendant and his grantor, in 1865, to buy the right of way through the alley; and *held further*, that complainant was entitled to relief irrespective of the act to quiet titles. *Rev. p. 1189. Kana v. Bolton,*

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2. The complainant sought by the bill to quiet his title to a lot of land, but raised no question of location in the bill. The defendant neither disclaimed nor otherwise noticed the matter by allegation in his answer or proof, but questioned the location.—*Held*, that the complainant's title to the lot must be established, leaving the question of location undecided. *Id.,*

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Equitable Conversion.

See PARTITION, 1.

Estoppel.

1. Under the authority of a statute, certain bonds were issued by a water company, secured by a mortgage on their property and franchises, and forty-eight of those bonds were taken by the contractors who built the company's works, as part payment therefor. All the company's property and franchises were afterwards sold by a receiver in insolvency, subject to all legal liens, and bought by the contractors, who re-organized the company, and conveyed the property and franchises to the new company, the contractors holding almost all of the stock of the new company. On foreclosure of the mortgage by the holders of twenty-four of the forty-eight bonds, which had been assigned by the contractors—*Held*, that the contractors and the old company and the new company were all estopped from alleging any invalidity in the execution or delivery of the bonds, or want of power of the old company to issue them. *De Kuy v. Voorhis,*

37

2. After the issue of common stock by a railroad company, a supplement to its charter was passed, which authorized the issue of preferred stock, on the following conditions: "That when so issued, * * * the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." In some years, dividends of seven per cent. or less were declared on the preferred stock alone, and in other years, such

Estoppel—Continued.

dividends were declared on both the preferred and common stock.—*Held*, that a holder of the preferred stock was not entitled to annual dividends thereon at a fixed rate, but only to dividends out of the annual profits, but when such profits had been earned, he was entitled to a dividend of seven per cent. therefrom, before any dividend could be paid on the common stock. *Elkins v. Camden and Atlantic R. R.*, 238

3. The silence or failure of a former owner of such preferred stock to object to the declaring of any dividends on the common stock until after he had been paid seven per cent. on his own, will not estop the present owner thereof from asserting his claim to re-imbursement to that extent out of the future profits. *Id.*, 238

4. A purchaser at a sale by a receiver, whose conditions of sale state that the property will be sold "subject to all legal liens and encumbrances thereon," is not estopped from contesting the validity of a prior mortgage upon the premises. *Hackensack Water Co. v. De Kay*, 548

See EASEMENT, 1; MORTGAGE, 15.

Evidence.

1. Where the bill calls for an answer under oath, and it is given directly responsive to the bill, it is the ordinary rule that the burden is cast on the complainant to prove the charge in his bill by more than one witness, or by the evidence of one witness corroborated by facts or circumstances equivalent to another witness. But where the defendant does not rely on his answer alone, but offers himself as a witness, he may refute himself by his own evidence, and circumstances added may overcome the answer. *Morris v. White*, 324
2. Where alterations and interlineations in a deed, prejudicial to the grantor, are claimed to have been fraudulently made, and the grantee admits that he made them after the deed was executed, but alleges that he did so with the knowledge and consent of the grantor, the burden of proof rests on the grantee. *Havens v. Osborn*, 426
3. The direct and positive answer of a defendant, responsive to the charges of the bill, respecting matters within his own knowledge, in a case where the complainant has required him to answer under oath, must prevail unless overcome by two witnesses, or by evidence equivalent thereto. *Frink v. Adams*, 485
4. In such case, the alleged agreement being with both respecting the same subject-matter, the result of which they were mutually and equally interested in, they cannot testify in behalf of each other as to transactions with or statements by the intestate. *Larison v. Polhemus*, 506

Evidence—Continued.

5. A witness is not entitled to credit, whose testimony is inconsistent with the common principles by which the conduct of mankind is usually governed. *Earle v. Norfolk Co.*, 188

See ADVANCEMENT, 1; DIVORCE, 3; FRAUDULENT CONVEYANCE, 2; MORTGAGE, 1; UNDUE INFLUENCE, 4; WILL, 14.

Execution.

1. The title of the purchaser of chattels at a sheriff's sale is not affected by mere irregularities of the sheriff in making the levy or advertising the sale. *Boylan v. Kelly*, 331
2. Sale of goods not at the time in the presence, or within easy access of bidders, or selling *en masse*, instead of in detail, chattels which may properly be separated, are grounds for setting aside such sale at the instance of interested parties. *Id.*, 331

See JURISDICTION, 3; PARTNERSHIP, 1.

Executors and Administrators.

1. There is no estate applicable to the payment of legacies until the testator's debts are paid. *Coddington v. Bispham*, 224
2. Though a creditor may be barred of his action against the executor of his debtor, he is entitled to a remedy against his debtor's legatee, if the legatee has received his legacy. *Id.*, 224
3. A fiduciary charged with the management of property, whether as executor or otherwise, has a right to employ counsel, when necessary or proper, to protect the estate, or to enable him properly to manage it, and the reasonable charges for such services will be paid out of the estate. *Kingsland v. Scudder*, 284
4. For the allowance of such fees out of the funds of an estate, it should appear to the court to be proper in view of the services rendered to the estate, and it is not enough that the executor and the parties interested in the estate consent to and petition the court for it. It should not be allowed unless it appears otherwise to be proper. *Id.*, 284
5. A testator gave to his daughter the income of all his estate for life, and the principal to her surviving children, and appointed her and her husband executors. He died in 1866, and the husband alone proved the will and filed an inventory. The estate consisted of a mortgage of \$1,600; fourteen shares of insurance stock, appraised at \$1,400, and \$3,000 of United States bonds. The executor sold the mortgage, and paid \$800 to his wife and expended the other \$800 in the support of his family. Owing to heavy losses by fire in 1871, the insurance company reduced the fourteen shares of stock to five. The United States bonds were converted by the executor, who died in 1880.—*Held*,
 - (1) That his estate was liable for the \$800 received by him from the mortgage, with interest from the date of its sale, and

Executors and Administrators—Continued.

also liable for the amount of the United States bonds, with interest to the time they were called, at the rate they bore, and afterwards at the rate fixed by law in this state.

(2) That under the act of March 17th, 1881 (*P. L. of 1881 p. 130*), his estate was not liable for the loss of the nine shares of insurance stock, and that under the circumstances it was not liable for interest on interest on the moneys converted by him. *Coddington v. Stone*, 361

6. Where an executor charged the estate for money paid for repairs and insurance premiums on the real estate—*Held*, that not being bound by the will to pay for such repairs and premiums, he could not be allowed for them in his account, in the absence of an agreement, as so much paid to the devisees on account of their interests in the personal estate. *Aldridge v. McClelland*, 288
7. An executor mingled the funds of the estate with his own, and used them for his own purposes.—*Held*, that he was chargeable with interest.—*Held*, also, that he was properly required to pay the costs of the exceptions which were rendered necessary by his charges, which plainly were not allowable. *Id.*, 288
8. A testator appointed "my beloved wife, Lydia Ann Clark, executrix, and my friends, William A. Lewis and ————, both of Jersey City aforesaid, executors of this my last will and testament, to which said executrix and executors, the survivors and survivor of them, I commit the proper administration of my estate, the execution of the powers and the discharge of the duties herein imposed." He also gave them a general power to sell any part of his real estate; appointed his wife one of two designated trustees for certain beneficiaries therein named, under bequests which were imperfect, and made other imperfect bequests. On April 16th, 1881, Mrs. Clark resigned as executrix and was discharged by the orphans court. On April 27th, 1881, Lewis sold part of the lands, and some of the lots were bought by Mrs. Clark. *Held*, that the power of sale was absolute and for conversion independently of the trusts; that by the discharge of Mrs. Clark as executrix, the power of sale, by statute, devolved on Lewis, and that she had a right to buy at the sale, and her title was not affected by her retaining her trusteeship, nor by the incomplete bequests; and she having sold part of those lots to the defendants, the court compelled them to accept a deed therefor, on a bill for specific performance. *Clark v. Denton*, 419
9. The excessiveness of commissions allowed to executors on an intermediate account cannot be examined by exceptions to one of their subsequent accounts. The only remedy is by an appeal from the former decree. If the commissions already

Executors and Administrators—Continued.

allowed to executors have been excessive, that fact may be taken into consideration by the court in fixing the amount of their commissions for subsequent services to the estate. *Reynolds v. Jackson*, 515

10. In the administration of estates of decedents in the court of chancery the assets will be applied as they would be applied in the probate court. Creditors will be allowed priority over legatees, who will take nothing until the debts are paid. *Coddington v. Bispham*, 574

11. Lands being assets for the payment of debts, rents accruing pending a suit in chancery for the administration of the estate and collected by a receiver appointed in that suit, are also assets to be applied in payment of debts. *Id.*, 574

See JURISDICTION, 5, 6; PARTIES, 6, 7, 11; PLEADING, 2; POWER, 3, 5, 6; WILL, 4.

F.**Fixtures.**

1. A portable iron furnace for heating a church, standing on the cellar floor, and held in position by its own weight, and capable of being detached, and also its pipes &c., without injury to the building, is not, as between mortgagor and mortgagee, a fixture. *Rahway Sav. Inst. v. Irving St. Bap. Church*, 61
2. A mortgage was given on lands and also on the nail and other factories, * * * machinery, * * * property and fixtures "thereon, or connected therewith or relating thereto."—*Held*, that nail machines, grindstones, a pair of shears, scouring machines, nail bins and grip levers—all used in manufacturing nails in the factory on the premises, and some of them permanently fastened to the building, and the rest adapted to the factory—are fixtures and go to the purchaser under the foreclosure of the mortgage; and also a duplicate cylinder for a bluing machine and duplicate pulleys for the grindstones, kept on hand for emergencies, although they may never have been in actual use. *Del., Lack. and W. R. R. Co. v. Oxford Iron Co.*, 452

Frauds and Perjuries.

1. In case a father enters into a parol agreement with two of his sons that if they will take charge of his farms and earn for him a given sum, he will then give up the farms to them; and they take charge and earn the sum named, and thereafter, until the father's death, by his consent, retain all the issues and profits, the taxes on the farms being assessed to him in their presence, no foundation is laid for a decree in favor of the said sons against the other heirs-at-law of the father to convey said farms. *Larison v. Polhemus*, 506

Fraudulent Conveyance.

1. Where a father conveys all of his property to his two young sons, under suspicious circumstances as to the time, the method and the consideration thereof, the fact that the deed itself purports to have been given for a valuable consideration, and that the answers of the sons, under oath, aver that it was so given and was *bona fide*, will not sustain it as against the father's creditors. *Hoboken Bank v. Beckman*, 83
2. Evidence of the statements of one of the two sons as to the partnership debt which is claimed to be the consideration of the alleged fraudulent conveyance, is competent against the other son. *Id.*, 88
3. A conveyance of lands in this state by a husband and wife to the husband's brother-in-law, was sustained against a judgment creditor of the wife on a judgment recovered in another state for her tort, where it appeared that the grantee was entirely ignorant of such judgment, and bought the lands, as he had been often importuned to do, at the request of the grantors, because of their inability to pay the taxes, assessments and encumbrances on the lands, although the grantee knew nothing about the property, had never seen it, and relied upon the grantor's statements as to the title, value and encumbrances. *Mathiez v. Day*, 88
4. That part of the purchase-money of a lot of land was paid by a husband with his wife's money, and that his father gave her a part of the materials afterwards used in erecting a house on the lot, is not a sufficient consideration to uphold a voluntary conveyance of the house and lot by the husband to the wife as against his creditors, whose debts were nearly all contracted before the date of the conveyance. *Aber v. Brant*, 116
5. The complainant acted as the mutual friend of the defendant and her father in effecting the exchange of a dwelling-house in Brooklyn owned by the defendant, for a store and a dwelling-house in Montclair, owned by her father (the latter occupied as his home), especially in fixing the relative values of the properties and the basis for their exchange, and urged it as advantageous to both parties. The father was about to make an assignment for the benefit of his creditors, and the complainant was at that time suggested as and he expected to be the assignee. The exchange was made on December 16th, 1877, and the assignment (which was made to the complainant) was made on January 14th, 1878. The defendant took possession of and occupied the Montclair property at once, her father also living there with her; and after the assignment she expended about \$2,000 in improvements thereon, as complainant then knew. Learning that her father's creditors were dissatisfied with the exchange, the defendant and her husband offered

Fraudulent Conveyance—Continued.

to re-exchange, if paid for her improvements, but the complainant, then assignee, did not accept the offer. The complainant, as assignee, collected the rents from the Brooklyn property, but allowed the taxes and interest on the mortgages thereon to remain unpaid, and the premises were afterwards, under foreclosure, to which the complainant was a party, sold to a third person.—*Held*, that the complainant was not entitled to a decree setting aside the exchange as fraudulent against the father's creditors, and that while his conduct in the exchange before the assignment, did not (of course) bind the creditors whom, as assignee, he represented in the suit, yet it showed that the exchange was made in good faith. *Pillsbury v. Kingon*,

413

See GIFT, 1; HUSBAND AND WIFE, 3; JURISDICTION, 3.

G.

Gift.

R. loaned his own money, taking a bond and mortgage as security therefor, in the name of his wife, and having the mortgage recorded without making any other delivery thereof to his wife, which appears to have been one of a number of transactions avowedly done, with the knowledge of the wife, to hinder creditors.—*Held*, that such transaction cannot be upheld as a gift against the creditors of the husband who have liens by judgment or attachment. *Conover v. Ruckman*,

493

See RELEASE.

Guardian and Ward.

See MORTGAGE, 12; PARTIES, 11.

H.

Husband and Wife.

1. Where the wife, surviving the husband, or her representative, after his death, claims money remaining in the homestead on the death of the husband, it is not enough to show that she once earned money, nor that she received a portion from her father's estate, nor that her husband at times gave her money, without further identifying such sums and showing that the moneys in question are the same, or that the moneys so earned or received by the wife passed to the husband without a lawful consideration. It must appear that at the time of his death he was her debtor. *Van Liew v. Galtra*,

251

2. A married woman lent money to her husband for the firm of which he was a member, on his representation that it was borrowed for the firm.—*Held*, that she might recover it from the firm. *Gould v. Gould*,

330

Husband and Wife—Continued.

3. A wife may execute a valid mortgage to secure the debt of her husband, but if such mortgage is voluntary, so far as the wife is concerned, it cannot be upheld against her creditors. *Butterfield v. Okie*, 482
 4. A husband and wife died within a few hours of each other, intestate and without issue. The wife had a separate estate and an income therefrom. A large sum of money in bank-bills was found, part in a pocket-book marked with the initials of the wife's name, part in another pocket-book marked with her father's name, also some gold coin in a bag, and some silver coin lying loose—all secreted in a trunk, marked with the wife's name, to which both had free access, the key usually being kept by the wife. Their deeds, bonds, notes, receipts, insurance policies &c., were also found in the trunk. There was no memorandum or other satisfactory evidence to show the amount contributed by either one to the money so found.—*Held*, that it must be equally divided between their respective representatives. *Van Liew v. Van Liew*, 637
- See BROKER, 1; FRAUDULENT CONVEYANCE, 3, 4; GIFT, 1; INJUNCTION, 2; SPECIFIC PERFORMANCE, 1; WILL, 10, 13.

I.

Injunction.

1. The court of appeals, notwithstanding the fact that the act sought to be enjoined by a preliminary injunction may have been accomplished, may hear and adjudge the right on which a preliminary injunction should have been granted, or, in its discretion, leave the decision of such matters until final hearing. *Terhune v. Midland R. R. Co.*, 318
2. The complainants sold the defendant a lot of land, the bargain being made through a firm consisting of defendant's husband and one Nones. The complainants, afterwards needing this lot to build a stable on their adjacent land, agreed with defendant's husband that she should take another lot belonging to complainants in exchange for the one first sold to her, and the complainants further agreed with defendant's husband to build a stable for her on the exchanged lot, and did so. Thereupon complainants built part of their own stable on defendant's first-mentioned lot. It did not appear that the husband had any authority to bind his wife.—*Held*, that an injunction to restrain defendant from proceeding at law to recover her first-named lot, could not be allowed. *Sternberger v. Hurtzig*, 375
3. Where an injunction is issued against a corporation, the officers, who neither do anything in violation of it, nor by concealment of the fact that it has been issued, conduce to such violation,

Injunction—Continued.

cannot be held liable for a breach of it. *Trimmer v. Penn., S. & N. E. R. R. Co.*,

411

4. The president of a savings bank abstracted a large amount of its securities. He afterwards fraudulently conveyed a farm to one of the active managers of the bank, who was cognizant of the whole transaction, receiving from him a bond and mortgage as part of the pretended purchase-money. The president, then, in order to make an apparent partial restitution, and to secure the bank for his malfeasance, assigned the bond and mortgage to the bank, with the knowledge of the manager, who paid to the bank the interest thereon as it fell due with money given to him by the president. The bank subsequently was placed in a receiver's hands.—*Held*, that this court will not enjoin the receiver's proceeding at law to obtain judgment against the manager on the bond, on the ground that the bond is without consideration. *Sweeney v. Williams*,

459

See PLEADING, 1; WATER RIGHTS, 1, 4.

Insurance.

The widow of a member of a voluntary, mutual life insurance association, claiming that as such widow she was entitled to receive from the association \$1,000 insurance on the death of her husband, filed a bill against two defendants, one the president and the other the secretary and treasurer, to compel payment of the insurance-money from the funds in their hands, or that the court might compel them to raise the sum by an assessment of the members. The bill further alleged that the decedent had, on account of his illness and through the mistake of a director of the association, to whom he had given the money, failed to pay an assessment levied on him within the time limited by the by-laws, and that his name had been stricken from the association for that reason, and without serving upon him a second notice to make such payment, as required by the by-laws, before he could be removed. Demurrer overruled, and—*Held*,

(1) That as it did not appear from the bill that there would be any occasion to make an assessment (it appeared by a printed statement in a copy of the by-laws put in by the defendants on the argument of the demurrer, that the association was in possession of ample funds to pay the \$1,000), it was unnecessary to decide whether the court had the power, in a proper case, to order an assessment to be levied on the members for such purpose.

(2) That the defendants were competent, as the officials of the association, to protect its rights, and that to require the joinder of all the members of the association as parties was impracticable and unnecessary.

Insurance—Continued.

(3) That impertinent matters might, under the two hundred and tenth rule, be struck out of the bill. *Van Houten v. Pine,*

133

See EXECUTORS, 6.

Interest.

See EXECUTORS, 5, 7; MORTGAGE, 1; PLEADING, 5-10; WILL, 6.

Issue at Law.

1. Where a litigation over lands is pending in this court, and the defendant apprehends that his rights may be embarrassed, if not defeated, by the running of the statute of limitations, if the bill should ultimately be dismissed, he may be allowed, for his protection, to try the title to the lands in controversy by an action of ejectment. Such proceedings, however, must be under the control of this court. *American Dock and Imp. Co. v. Trustees,*

16

See JURISDICTION, 2.

J.**Jurisdiction.**

1. Two mortgages on land were given, one in 1868 and the other in 1869. In 1870, the owner of the fee conveyed a strip of the premises to Mrs. James for a party wall, which strip Mrs. James conveyed to complainant in 1877. In 1878 the owner of the fee conveyed another strip of the premises to complainant for the same purpose, and also the rear of the premises. None of these conveyances was made subject to the two mortgages. In 1874, the owner of the fee conveyed all the rest of the premises to Mrs. Goulard, who thereby assumed the payment of both of the mortgages as part of the purchase-money. In 1880, Mrs. Goulard and her husband entered into an agreement with the holders of the two mortgages, that the holder of the first mortgage, Mrs. Gordon, should foreclose it, making the holder of the second mortgage and the complainant, and the Goulards, defendants thereto, and that Mr. Goulard should buy in the premises at the foreclosure sale, for a nominal price, and then pay off both mortgages, the Goulards' object being to obtain title to complainant's part of the premises without paying any consideration therefor. The agreement was carried out, and Goulard bought the premises for \$3,500, and paid off both mortgages, subsequently giving a new mortgage on all the premises, except the party-wall strip, to Mrs. Gordon.—*Held*, that a demurrer for want of equity would be overruled, because complainant's remedy at law on the covenants in his deed for the party-wall strip was inadequate, for the wall of his own house is built into the defendants, and a foundation for an in-

Jurisdiction—Continued.

dependent wall cannot be laid there without piling, the driving of which the defendant's house prevents; and, also, because the foreclosure proceedings were fraudulent and collusive, and an abuse of the process of the court, and the fact that Goulard paid more than a nominal price at the foreclosure sale makes no difference; and, also, because the charges of the bill implicate Mrs. Gordon in the sham foreclosure, and raise an equity against her. *Edge v. Goulard*,

43

2. A bill was filed to obtain the construction of a will, and the answer attacked the will because it had not been executed according to law, and because the testatrix did not possess testamentary capacity, and because the will had been obtained by fraud. At the hearing it was adjudged that this court had no jurisdiction to try the validity of the will. The will had been admitted to probate nine years, and its genuineness recognized and sworn to by the executor, who was the devisee, and under whose will the answering defendant claims the property as devisee.—*Held*, that a feigned issue to try its validity would not be ordered upon the application of the answering defendant. *Trustees v. Wilkinson*,

139

3. A creditor recovered a judgment against thirteen joint and several debtors, and issued an execution against them all, under which levies were made, ample to satisfy the judgment debt; twelve-thirteenths of the whole amount of the judgment had been paid by twelve of the defendants, each one paying one-thirteenth.—*Held*, that, since the creditor could make the whole debt out of the property under levy, this court had no jurisdiction to entertain a bill filed by the creditor to set aside fraudulent conveyances made by the thirteenth debtor (the defendant), in order to defeat the complainant's attempt to satisfy the remaining unpaid one-thirteenth of the judgment out of the defendant's property. *Wales v. Lawrence*,

207

4. The power of the court, in insolvency, over foreign corporations is mainly over their property or assets in this state; the lien of the defendants and other creditors under the attachments was, under the circumstances, entitled to preference as against the receiver, and the United States court had jurisdiction, and this court therefore could not interfere. *Minchin v. Second Nat. Bank*,

436

5. In 1843, Dr. Frederick A. Van Dyke, a resident of Pennsylvania, proved the will of his brother, James C. Van Dyke, a resident of Somerset county in this state, in Somerset county. He filed an inventory here, but no account. In 1867, he died in Pennsylvania, and his will was duly proved there by his three sons, one of whom did not act and was afterwards discharged, leaving Frederick A. and Henry J. the acting executors. In

Jurisdiction--Continued.

- 1870, Frederick A. Van Dyke took out letters of administration on Dr. Frederick A. Van Dyke's estate in Middlesex county, and also letters on the remaining estate of James C. Van Dyke. An exemplified copy of Dr. Frederick A. Van Dyke's will was filed in the Middlesex surrogate's office. Frederick A. Van Dyke is now dead. One claiming to be a beneficiary under a trust under the will of James C. Van Dyke, applied to the orphans court of Somerset county to require Henry J. Van Dyke, who is a non-resident, to settle the account of Dr. Frederick A. Van Dyke as executor of James C. Van Dyke.—*Held*, that that court had no jurisdiction to require him to account, and that notwithstanding the beneficiary's efforts to obtain such an accounting in the Pennsylvania courts have been futile. *Van Dyke v. Van Dyke*, 521
6. Whenever a bill is filed in equity against executors, either by a creditor or by residuary or other legatees, touching the administration of the estate, the suit is for the benefit of all persons interested as creditors and legatees, and the court may assume the general administration of the estate and make a final disposition of the assets. *Coddington v. Bispham*, 574
7. The power of the court of chancery in administration suits to ascertain by its own peculiar methods the amount of the debt due to the obligee on a bond made by the deceased and secured by a mortgage, is entirely independent of section 76 of the chancery act, relating to decrees for deficiency in foreclosure suits, and is not affected by the repeal of that section by the act of 1880. *Id.*, 574
8. The jurisdiction of chancery over suits for the administration of the assets of decedents, concurrent with the probate courts, with the power to have an account taken of the assets and debts and liabilities of the deceased, and to make distribution of the residue after debts are paid, is part of the ancient and inherent jurisdiction of courts of equity. *Id.*, 574
9. When, by statute, a right to administer relief, previously administered only by courts of equity, is extended to courts of law, the former courts are not thereby deprived of jurisdiction unless prohibitory or restrictive words are used in the statute; thenceforth the jurisdictions are concurrent. *Sweeney v. Williams*, 627
10. When the jurisdictions are concurrent, a court of equity will not assume jurisdiction of a matter of which a court of law has already acquired cognizance, unless the latter cannot afford all the relief the party is entitled to. *Id.*, 627
11. Because a suit is pending at law, the defence to which is want of consideration not cognizable at law, a court of equity ought not to decline jurisdiction of a bill asking a perpetual injunction.

Jurisdiction—Continued.

tion against the bond and against a mortgage securing the bond. *Id.*,

627

See PRACTICE, 2; TAXES, 2; WATER RIGHTS, 4; WILL, 9.

L.**Landlord and Tenant.**

See NOTICE, 1, 2.

Legacy.

1. A widow may, on tendering a refunding bond, demand of her husband's executors a legacy given to her by his will, and they have no right, on an allegation that the legacy was given to the widow in lieu of her dower, to demand, as a condition of paying the legacy, that she shall give a release of her dower in the real estate. *Vreeland v. Vreeland*,

32

See EXECUTORS, 2, 10; WILL.

M.**Marshaling Assets.**

The complainant, being the earliest grantee of owner, had an equity against mechanics lien-claimant to have its property sold last to satisfy the lien. A subsequent mortgagee of another portion of the lien-curtilage obtained a decree of foreclosure, to which complainant was not a party, excepting expressly the complainant's interest from the foreclosure sale. After this decree, the mortgagee bought up the lien-judgments and thereunder sold the interest of the complainant, excepting from such sale other parts of the lien-curtilage.—*Held*, that this was an inequitable use of the law-judgments, by which the due order of priority was reversed. The mortgagee who purchased at sale on lien-judgments enjoined from prosecuting ejectment against complainant. *Acquackanonk Water Co. v. Manhattan Life Ins. Co.*,

586

See MORTGAGE, 1.

Master in Chancery.

See PRACTICE, 4, 6.

Maxims.

<i>Cessante ratione legis, cessat ipsa lex,</i>	197
<i>De minimis non curat lex,</i>	541
Equality is equity,	643
<i>Interest reipublicæ ut sit finis litis,</i>	37
<i>Nemo debet esse judex in propria sua causa,</i>	481
<i>Qui prior est tempore, potior est jure,</i>	483
<i>Ubi jus, ibi remedium,</i>	523, 524

Mechanics Lien.

See MARSHALING ASSETS, 1.

Mistake.

In 1871, the complainant and two adjacent land-owners agreed in writing with the defendant to convey to him a strip of land for a road, with an exception or reservation to the vendors of a right to use the road. By a mistake of the scrivener, who was chosen by the defendant, the complainant's deed did not state that the strip was conveyed for a road, and also omitted the exception or reservation of his right to use it. The road was used by the complainant from 1871 to 1881, when the defendant denied his right to use it. The complainant discovered the mistakes in his deed in 1879.—*Held*, that the deed should be reformed so as to state that the land was conveyed for use as a road, and also complainant's right to use it. *Stines v. Hays*,

364

See PLEADING, 3, 8.

Mortgage.

1. A mortgage on lands was given in 1864, payable in two years, with interest at six per cent. The mortgagor conveyed the lands to Smith in 1868, subject to the mortgage. Smith sold and conveyed parts of the lands by warranty deeds, as follows: 1. To McCarter, by deed without date, but acknowledged May 30th, 1868, delivered June 2d, 1868, and recorded June 2d, 1868. 2. To Morford, by deed dated May 27th, 1868, delivered May 30th, 1868, and recorded September 22d, 1868. 3. To Swayze, by deed dated May 30th, 1868, delivered May 30th, 1868, and recorded July 31st, 1868. 4. To Howell, by deed dated June 3d, 1868, acknowledged June 13th, 1868, and recorded June 25th, 1868. 5. To McCarter, by deed in 1869. 6. To Swayze, by deed in 1870. The mortgagee, in April, 1872, released the *fourth* tract from the lien of the mortgage. During 1868, the mortgagor's grantee, Smith, by writing endorsed on the bond, agreed to pay interest thereon at the rate of seven per cent. thereafter.—*Held*,

(1) That as the mortgagee had actual notice and knowledge of the first, second and third conveyances at the time when she released the fourth from the encumbrance of her mortgage, she must, before resorting to the first, second and third tracts, on foreclosure, credit those tracts with the value of the tract released, and that value must be estimated as of 1872, when the release was given, although the tract released was then worth less than it was in 1868, when the deed for it was given.

(2) That as the pleadings raise no question touching the competency of the mortgagee when she executed the release,

Mortgage—Continued.

or attacking its validity, evidence pertaining thereto is irrelevant and cannot be considered.

(3) That, in establishing the liability of 1, 2 and 3 respectively, as McCarter (1) had no notice of the conveyances to Morford (2) and Swayze (3), although both 2 and 3 preceded 1, and neither 2 nor 3 was recorded within the statutory limit of fifteen days, 1 is entitled to priority over 2 and 3. That as there is no competent evidence as to whether 2 or 3 was delivered first, the date must control and be taken as the time of delivery. Hence, 2 has priority over 3, but if 3 was, in fact, delivered before 2, its preference was lost by its not having been recorded within fifteen days after its delivery, and its being actually recorded before 2 will not restore its priority.

(4) The agreement of the mortgagor's grantee, Smith, to pay interest on the mortgage, at seven per cent., having been made after the mortgage debt was due, is valid and binding on his grantees, although never recorded. *Hill v. Howell*, 25

2. A mortgage on two lots of land contained a stipulation that the mortgagee would release the first lot from the mortgage, on the payment of \$300 on account of the mortgage, at any time before its maturity. Five months before the mortgage became due, the mortgagee credited \$1,100 on the mortgage, representing interest due thereon and moneys paid by the mortgagor, on behalf of the mortgagee, on transactions having no connection with the mortgage whatever. On foreclosure—*Held*, that the mortgagor could not claim the benefit of the stipulation so as to withdraw the first lot from the lien of the mortgage. *Woodburn v. Gannon*, 69

3. Where J. is the real complainant in a foreclosure of a mortgage on lands, and A. the ostensible one, and the county records show a prior mortgage on the same lands, standing in the name of A. (although it is proved never to have been delivered), and there is also a deed to J., which is in fact a mortgage, and the foreclosure bill makes no reference thereto, a sale of the premises under the decree will not be allowed until after the character and validity of the other encumbrances shall have been determined. *Wyckoff v. Noyes*, 227

4. The act of April 21st, 1876, exempting mortgages by corporations embracing chattels from the requirement of the chattel mortgage act, is prospective only. *Boylan v. Kelley*, 331

5. A mortgage on lands was duly executed and acknowledged by the defendant and also by her daughter and son-in-law, and the latter delivered it to the complainant. The premises had, shortly before the mortgage was given, been conveyed to the defendant by the son-in-law, who represented that he still retained some interest in the lands, and who was authorized by

Mortgage—Continued.

- the defendant to negotiate and obtain the loan secured by the mortgage. The money was paid by the complainant to the son-in-law when the mortgage was delivered.—*Held*, on foreclosure, that his failure to pay over the money to the defendant was no defence, and that the defendant's answer under oath alleging that the mortgage was not delivered, was not of itself enough to overcome the presumption of delivery arising from the mortgagee's possession of the mortgage, duly executed and acknowledged. *Long v. Kinkel*, 359
6. The statute (*Rev. p. 706*) provides that an unregistered or unrecorded mortgage shall be void and of no effect against a subsequent judgment creditor, or *bona fide* purchaser or mortgagee, for a valuable consideration, without notice.—*Held*, that the phrase "for a valuable consideration" applies only to purchasers or mortgagees, and therefore a judgment creditor who buys the debtor's land at an execution sale under his judgment, and credits the price on his judgment, holds the land free from a prior unregistered or unrecorded mortgage thereon of which he had no notice, and such mortgagee has no right to redeem. *Condit v. Wilson*, 370
7. Although a deed for lands contains the grantee's personal assumption to pay a mortgage thereon, he cannot be held liable for a decree for deficiency after foreclosure of the mortgage, if it appears that such assumption was not part of his bargain for the purchase of the premises, and that he had no notice of its insertion in his deed. *Parker v. Jenks*, 398
8. The charter of Jersey City (it went into operation in 1871) provides that water-rents for water supplied to the owner or tenant of any lot shall be a lien paramount to any alienation or encumbrance thereof. The complainant's mortgage was given in 1872.—*Held*, that he took his mortgage subject to liability to lien, under the charter, for water-rents, for water supplied to the mortgaged premises subsequently, and that they consequently were a lien prior to the mortgage. *Vreeland v. O'Neil*, 399
9. A prior debt is a sufficient consideration to give a mortgage the character of a *bona fide* mortgage for value against a secret equity unsupported by any legal right. *Butterfield v. Okie*, 482
10. A deed absolute on its face may, where such was the intention of the parties, be declared to be a mortgage, but its character must be determined by the intention of the parties at the time of its execution and not at a subsequent date. *Frink v. Adams*, 485
11. A grantee for value of a mortgage under a deed absolute on its face, who acquires title without notice that the deed was a mortgage, will hold the land free from the equities of the mortgagor. *Id.*, 485

Mortgage—Continued.

12. While complainant was a minor, a partition sale of lands, in which he owned an undivided one-third, was ordered by the orphans' court. At the sale the commissioners, without direction from the court, announced that they would accept seventy per cent. of the purchase-money in first mortgages, and did so, but reported the sale to the court as if it had been for cash only. Several persons (the defendants) agreed that Beam should buy part of the land for them at the sale, which he accordingly did, and he gave several mortgages for the seventy per cent., in his own name, to the commissioners, who assigned part of them to the complainant's guardian on account of his interest in the lands. Beam also executed a declaration of trust, stating that he held the title in trust for himself and the defendants, and they paid their respective portions of the thirty per cent. required at the time of sale, and the interest subsequently accruing on the mortgages. The guardian assigned the mortgages to the complainant when he attained his majority. On foreclosure, the premises did not produce enough to satisfy the mortgages.—*Held*, that the defendants, who authorized Beam to purchase for them, were not personally liable for the deficiency. *Burhans v. Beam*, 497
13. A mortgagee has no right, as mortgagee, to the rents of the mortgaged premises which have been paid into the court of chancery by a receiver appointed in a suit by legatees for the administration of the estate of the mortgagor, although the mortgagee has obtained a decree for the foreclosure of his mortgage in the same court, and has sold the mortgaged premises and part of the debt is unsatisfied. He should have applied to discharge the receiver in the administration suit, and entered into possession himself, or applied for a receiver in his foreclosure suit. *Coddington v. Bispham*, 574
14. Rent collected by the receiver in an administration suit becomes part of the assets to be administered under the direction of the court, and the only right of the mortgagees of the premises for which rent has been collected by the receiver is, if he holds an obligation of the deceased, to come in as a creditor in common with other creditors. *Id.*, 574
15. When a bond and mortgage, made without actual consideration as between the parties thereto, has been assigned to a third party, although the evidence does not satisfactorily show that it was executed with a pre-existing design or consent on the part of the maker that it should be so assigned, yet if the maker, by words or acts, afterwards assents to such assignment and ratifies it, the bond and mortgage are thereafter unassailable in the hands of the assignee. The proofs in this case show such assent and ratification. *Sweeny v. Williams*, 627

Mortgage—Continued.

See BROKER; CONSTITUTION, 1; CORPORATIONS, 7; FIXTURES, 12; GIFT, 1; HUSBAND AND WIFE, 3; JURISDICTION, 7; MARSHALING ASSETS, 1; MUNICIPAL CORPORATION, 2; NOTICE, 1-8; PARTIES, 8; POWER, 1-3, 5; SUBROGATION, 1-4.

Municipal Corporation.

1. A municipal corporation may be enjoined from discharging the water-drainage from the gutters of its streets on private lands, in such quantities as to impair the value and use of those lands. *Field v. West Orange*, 118
 2. The charter of Elizabeth requires that in laying out and opening streets compensation must be made to the *owner or owners* of lands and real estate taken for the improvement.—*Held*, that this does not require compensation to be made to mortgagees specifically; that the compensation is to include the value of all the interests burdened by the public easement, and is to be paid to the *owner* of the land if no other claimant intervenes, and if, in any case, such owner ought not in equity to receive the whole, timely resort must be had to the court of chancery, which will see to the equitable distribution of the fund. *Crane v. Elizabeth*, 339
 3. The common council of Atlantic City have no power to order money to be raised by taxation for the erection of school-houses. It requires a majority vote of the assembled inhabitants of the school district for that purpose. *Lee v. Trustees*, 581
 4. Money raised under authority of the thirty-first section of the charter of Atlantic City (*P. L. of 1866 p. 330*) for school purposes, cannot be applied by the school trustees to the erection of school-houses. *Id.*, 581
- See MORTGAGE, 8; STATUTES OF NEW JERSEY (PUBLIC); WATER RIGHTS, 2.

N.**Navigation.**

See BRIDGE, 1; WATER RIGHTS, 5.

Notice.

1. An assignee of a lease for years employed an attorney in executing a mortgage on his interest in the demised premises. Several years afterwards the defendant employed the same attorney to investigate the title of the same premises before taking a mortgage on the fee.—*Held*, that the defendant was not bound by the attorney's former actual notice of the existence of the leasehold mortgage. *Spielmann v. Kliest*, 199
2. A lease for years contained a provision that the owner of the fee should pay the lessee, at the end of the term, the value of any buildings put up by the lessee on the demised premises, who

Notice—*Continued.*

- afterwards erected buildings thereon. The lease was acknowledged and recorded as a deed. The lessee mortgaged his interest to the defendant during the term, which mortgage was duly registered as a mortgage of lands. At the expiration of the term, but while the lessee still remained in possession, the owner of the fee mortgaged his interest to the complainant.—*Held*, that the record of the lease and of the mortgage on the lessee's interest was constructive notice to the complainant, so as to render defendant's mortgage a prior lien on the buildings. *Id.*, 199
3. If a judgment creditor have notice of the execution of a prior unregistered mortgage, it is of the same effect, as to him, as if it were registered. *Morris v. White*, 324
 4. Where there is no fraud shown, the fact that a judgment creditor knew that a mortgage was intended and being prepared, will not deprive him of the right which a creditor has to secure a just debt by greater vigilance and promptness. *Id.*, 324
 5. The doctrine of notice of an unrecorded mortgage giving priority of lien, is based on fraud. *Id.*, 324
 6. When payment of prior mortgages on taking a new mortgage does not give the right of subrogation. *Id.*, 324
 7. A mere vague, general statement by a mortgagor to his creditor, before suit brought, that his property was mortgaged for all it was worth, is not notice of an unregistered or unrecorded mortgage on his land. *Condit v. Wilson*, 370
 8. Notice of an unregistered or unrecorded mortgage on lands at the time of selling the lands under a judgment, is invalid if the creditor had not notice when he recovered his judgment. *Id.*, 370
 9. In 1842, Shinn, who was seized of an undivided moiety of a tract of land with Price, agreed to sell his moiety to Price for a certain number of cattle, and in pursuance thereof executed a deed to Price and had it recorded, but Price refused to receive the deed when tendered to him, or to deliver the cattle. In 1855, Crammer, who then owned Price's moiety, and Shinn executed mutual releases for the land, and the release given to Crammer was recorded shortly afterwards, but Shinn did not have his release recorded until 1870. In 1869, Crammer's administrator executed a deed to the defendant, reciting that said Crammer became seized of the one-half of said premises by deed from Shinn, dated and recorded &c. The defendant also claimed the land, or some interest in it, through Ridgeway, to whom Price's heirs-at-law had executed a deed.—*Held*, that the recitals in the deed of Crammer's administrator to himself were enough to put the defendant on inquiry, and further, that he was bound by a statement by one of Price's heirs (his son)

Notice—Continued.

to Ridgeway, made when their deed was given, that his father never owned, or claimed to own, the property, and that they (Price's heirs) had no claim on it. *Jennings v. Dixey*, 490

See BONA FIDE PURCHASER, 1; MORTGAGE, 1, 7, 11; VENDOR AND PURCHASER, 4; WATER RIGHTS, 1.

P.**Parties.**

1. A corporation may be enjoined upon the application of a single stockholder of the purchasing company, and the fact that such stockholder had obtained his stock after the passage of the resolutions, and with the avowed design of preventing its consummation, will not affect his right to relief. *Elkins v. Camden and Atlantic R. R. Co.*, 5
2. A railroad company, the complainants, had located their line over part of defendant's farm, but needed more of defendant's land for a depot &c. The defendant refused to sell the quantity required, but offered to sell the whole farm. The complainants, prohibited by their charter from buying any more land than was actually necessary for railroad purposes, engaged one Lewis to buy the whole farm, and advanced the money to him for that purpose, under an agreement that Lewis should convey so much of the farm to the complainants as they required, and the remainder of the farm to one Babbitt. Lewis thereupon agreed orally with the defendant to buy the whole farm (the defendant, as the bill alleges, being cognizant of the whole transaction), and the written agreement therefor was to be signed and the deed delivered in ten days, the defendant being then absent. Lewis took possession of the whole farm at once, and delivered to complainants possession of the part they needed. Afterwards defendant refused to convey the farm to Lewis. On a bill for a specific performance filed by the complainants to compel defendant to convey the whole farm to Lewis, or so much thereof as complainants need, to them—*Held*, that Lewis was a necessary party to the suit, but Babbitt was not. *Penn. and N. E. R. R. Co. v. Ryerson*, 112
3. All persons who have in the object or objects of the suit an interest, apparent on the record, are necessary parties to a suit in equity. *Commissioners v. Johnson*, 211
4. Several depositors in a savings bank cannot join in a bill against the directors, on the ground that they were severally induced by the false publications of such directors to put their money in such institution, the same proving to be insolvent, such cause of complaint not being joint. *Chester v. Halliard*, 313
5. Nor can such depositors proceed in their own right, without making the corporation a party, to call the directors to ac-

Parties—Continued.

- count for the loss of the capital of the bank by the neglects and misconduct of such officers, such bank being the person primarily injured by such cause. *Id.*, 313
6. Where, on petition, heirs-at-law claim a fund in court, on the ground that it is to be treated as real estate, the administrator of the ancestor through whom such heirs claim, is a necessary party to the procedure. *Cox v. Roome*, 317
7. A non-resident testator gave to his wife and son the joint income and use of all his estate for their natural lives, with remainder to his lawful heirs, and also directed that no portion of his estate should be sold unless necessary for the maintenance of his son, and then only so much as might be required for his maintenance. His widow, who was his executrix, filed a bill, as executrix and individually, against the son and the testator's brothers and herself as guardian (appointed in Massachusetts) of the former, who is feeble-minded, for a decree directing her to sell testator's lands in this state, on an allegation that the proceeds of the sale of such lands were needed for the son's maintenance.—*Held*, that the suit should have been brought in the name of the son. *Walker v. Walker*, 376
8. A complainant filed a bill for strict foreclosure against a township which claimed under a sale of the premises for taxes, and stated that he bought and held the premises as trustee for a partnership composed of himself and two other persons, whom he made defendants.—*Held*, that they should be made complainants instead of defendants. *Jewell v. West Orange*, 403
9. On September 13th, 1881, the complainant, on behalf of himself and other creditors, filed a bill against the New York Silk Manuf. Co., a foreign corporation doing business in this state, alleging that it was insolvent and praying for the appointment of a receiver of its assets in this state, and for an injunction restraining it from receiving any of the debts due to it, and from paying or transferring any of its debts, money or effects. On October 21st, 1881, the injunction was issued, and early in November, 1881, a receiver was appointed. On October 3d, 1881, the defendant issued an attachment out of the Hudson county circuit court, under which all the silk company's property in this state was attached and other creditors came in. On October 29th, 1881, the defendant issued another attachment out of the same court, under which the same property was seized, and other creditors came in. Both attachments were afterwards removed into the United States circuit court for New Jersey, and the president of the corporation entered an appearance in the attachments in December, 1881. On demurrer to a supplemental bill filed by the complainant against the defendant and the other creditors admitted

Parties—Continued.

under the attachment and the auditor—*Held*, that the complainant had no standing as a party; that the suit, if maintainable, ought to have been brought in the name of the receiver.

Minchin v. Second Nat. Bank, 436

10. A suit for a foreclosure of a mortgage, given by a corporation to a trustee to secure a number of negotiable bonds issued under legislative power, is for the benefit of all the bondholders, whether the bill be filed by the trustee or by the holder of some of the bonds, making the trustee a defendant therein; and the holders of other bonds may come in and prove before the master without making themselves parties to the suit.

Hackensack Water Co. v. De Kay, 548

11. A testator gave to his wife the income from certain property during her life, with remainder to their children. At the time of her death, there were due to her from his executors about \$3,400 on account of accrued income. The minor children, who are the sole legatees under their mother's will, and under it entitled to all her property, and are non-residents with a guardian duly appointed at their domicil, applied for authority for their guardian to receive the money and remove it to the place of their domicil, under the act authorizing the payment of funds here to the guardian of non-resident infants. The executors resisted the application, on the ground that the money can only be recovered by the legal representative of the mother's estate here, and that they cannot be required to pay to any one else. The objection was sustained and the order refused. *Mahnken's Case*,

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See CORPORATION, 3; INSURANCE, 1; WILL, 9.

Partition.

Where, on a bill filed for the partition of lands, they are sold under the statute, and a defendant, without filing plea or answer, accepts of all she is entitled to, excepting her share of the portion invested for a brother during his lifetime, under the will of their father, all her interest is thereby converted into personalty. *Jacobus v. Jacobus*,

248

See MORTGAGE, 12; WILL, 6, 7.

Partnership.

1. An officer having process of execution or attachment against one partner may seize the latter's interest in partnership property; but a purchaser at a sale under such process will acquire only the interest of the partner in the partnership property, after the firm debts are paid and the affairs of the partnership are adjusted. *Clements v. Jessup*,

569

2. The capital of a partnership, *ex necessitate rei*, is the property of

Partnership—Continued.

the firm, and goods and chattels, the property of one of the partners, put in by him as part of the capital he agreed to contribute to the partnership, become partnership property, and as such are liable for the payment of the firm debts in priority over the debts of the individual partner whose property they formerly were. *Id.*, 569

3. A and B became partners under articles of partnership, to continue for four years—A to provide the capital, and B to contribute his labor and services. As part of the capital, A put in certain goods and chattels he owned individually such as were necessary in the firm's business. After the firm commenced business, and the goods and chattels in question had been put in, an attachment issued against A for an individual debt.—*Held*, that a chattel mortgage upon the same property, made by both partners for the firm's debt, had priority over the title of a purchaser at a sale of them under the attachment, although the attachment was prior in time to the chattel mortgage. *Id.*, 569

See FRAUDULENT CONVEYANCE, 2; HUSBAND AND WIFE, 2; PARTIES, 8; PLEADING, 2.

Pleading.

1. A watercourse ran through complainant's land, then through defendant's land and was discharged upon another part of complainant's land below. A bill was filed to restrain the defendant from obstructing the watercourse on his land, and thereby diverting the stream, so that its volume was increased, and threatened to injure complainant's mill by backwater. The injunction was denied on the weight of testimony, which showed, however, that the defendant had obstructed the flow of the water at certain points outside of the place on defendant's land where complainant alleged the watercourse was located.—*Held*, that complainant was not, under the general prayer for relief, entitled to an injunction restraining defendant's obstruction of the flowage on his land outside of the place where it is alleged the watercourse is. *Rigg v. Hancock*, 42
2. A bill by the administrator of a deceased partner against his copartner, alleging that the administrator had applied to such copartner for a statement of the accounts of the firm, showing its assets and liabilities and the balance due the administrator; that the copartner had rendered such account; that the administrator, in ignorance of the partnership affairs, and confiding in the copartner's statement, had, through the fraudulent representations and acts of the copartner, been induced to accept a less amount than was actually due his intestate from the firm, and also asking for an account, is not demurrable, because there has been, as claimed, an account stated, since the bill does not

Pleading—Continued.

- set out an account stated; nor because the bill seeks both an account and to surcharge an account as to the same matters; nor on the ground that the administrator has a remedy at law. *Harrison v. Farrington*, 107
3. An answer to a bill to enforce a vendor's lien for purchase-money set up that the complainant was not, when he made the conveyance, seized of the property, and was not the owner of part of it; and further, that it was understood that an account between one of the grantees and the complainant should be offset against so much of the purchase-money. On objection to those points of the answer, it was ordered that they be stricken out because the answer did not allege fraud or mistake, or that the deed contained covenants of title; nor that it was agreed that the specified claims should be a set-off. *Lewis v. Cranmer*, 124
4. Where a bill calls for an answer to several distinct averments according to defendant's knowledge, information, remembrance and belief, an answer merely denying knowledge is defective. It ought also to include defendant's information. *Reed v. Cumberland Ins. Co.*, 147
5. Where a bill asks for a discovery of the contents of a lost policy of insurance, an answer referring to a copy of such policy as annexed thereto, and having such copy annexed, is sufficient. *Id.*, 147
6. Where the bill states that the complainant desired more insurance on his premises, and so notified the defendants; that the defendants consented thereto, but declined taking such additional risk themselves, and by their agent directed complainant where to obtain it, an answer that this statement is untrue is defective. It ought to have added that no part of it is true. *Id.*, 147
7. Where the bill asserts that application for payment of the loss under complainant's policy was made to defendants, and makes allegations as to defendant's replies thereto, an answer setting forth the correspondence between the parties on that subject by letter, held unobjectionable. *Id.*, 147
8. Where the bill alleges that defendants had, after complainant's loss, made an assessment on his premium-note in order to pay another loss, and thereby waived any forfeiture for breach of condition of his policy, a denial in the answer that such an assessment had been made, coupled with an averment that if so it had been made through a mistake of defendants' agent, and that the amount of the assessment had been afterwards promptly tendered to complainant, may be permitted to stand. *Id.*, 147
9. Statements in the answer in this case in regard to the by-laws of the defendants (a mutual insurance company), and their bind-

Pleading—Continued.

- ing effect on the complainant as a member of the company—
Held, not irrelevant. *Id.*, 147
10. Where the bill avers that the premises destroyed were worth \$4,500, a declaration, in the answer, that complainant adjusted his claims against the other insurance companies which held risks thereon, on a basis that fixed the value of the insured premises at \$2,500, is not impertinent. *Id.*, 147
11. Averments in the stating part of a bill, evidently intended as statements of facts, must be answered by the defendant if he intends to deny them, although the complainant "charges" the facts, instead of "shows" or "alleges" them. *Halsey v. Ball*, 161
12. Objections on account of unimportant or immaterial statements or omissions in an answer should be discountenanced. *Reed v. Cumberland Ins. Co.*, 393
13. Objection for insufficiency may be taken to the answer of a corporation, or to an answer, oath to which has been waived. *Id.*, 393
- See EASEMENT, 2; EVIDENCE, 13; SPECIFIC PERFORMANCE, 1, 2.

Power.

1. A power to mortgage is sometimes implied in a power to sell. *Loebenthal v. Raleigh*, 169
2. Where power of sale is given to raise a particular charge only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising the money should be preferred to the latter. *Id.*, 169
3. A will contained this clause, "If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power to do so either at public or private sale." The estate included a very large tract of land, which could only be sold to advantage as a whole, and whose value would be greatly depreciated by selling any part or parts of it, and by reason of its character and value a purchaser could only be obtained exceptionally and by effort. On an application by the executors (in which the beneficiaries under the will joined)—*Held*, that authority to mortgage it to raise sufficient money to pay the debts after applying the personal estate, should be given. *Id.*, 169
4. The power to dispense a fund carries with it, by implication, the power to select the particular beneficiaries. *Hesketh v. Murphy*, 304
5. A testator gave to his executor power to sell his lands, with the assent of a majority of the devisees, who were his wife, his

Power—Continued.

brother and his three sisters, in case of their inability to make a partition. The executor, his brother (one of the devisees), gave to his sisters a mortgage for \$8,000 on his interest in the premises, or in the proceeds, if the land should be sold, for moneys loaned by them to him, and also to indemnify them as sureties on his bond as executor. A mortgage on the premises was also given by him and his sisters to the widow to secure to her \$1,000 due her from the testator, and also to secure to her an annuity in lieu of her claims under the will. Upon the devisees' request, they being unable to make partition, the property was sold by the executor.—*Held*,

(1) That the claim of the sisters under their mortgage, to be paid from the executor's share of the proceeds of the sale, was superior to that of his individual creditors, who had obtained judgments against him before the sisters' mortgage was given.

(2) That the devisees giving the widow a mortgage for the debt due her from the testator, did not deprive them of the power to consent to a sale of the premises under the will. *Duryee v. Martin*, 444

6. When a power to sell lands is vested in two executors or the survivor of them, the clause describing them as executors and not by their names, if one of them be removed from the office, the power becomes lodged in the remaining executor. *Denton v. Clark*, 534
 7. The case of *Weimar v. Fath*, 14 Vr. 1, approved. *Id.*, 534
- See CORPORATIONS, 7; EXECUTORS, 8; INSURANCE, 1; WILL, 11.

Practice.

1. A prayer for process, in a bill, against "the said defendants," without naming anybody, where it does not appear with reasonable certainty, in the other parts of the bill, who are referred to as "the said defendants," and in other parts of the bill some only of the persons who are necessary parties are mentioned as the defendants, is fatally defective, if necessary parties to the suit are thereby omitted. *Howe v. Robins*, 19
2. Where a defendant claims by his answer the same benefit that he would have been entitled to had he demurred, and sets up a general denial of jurisdiction, he can only insist upon this defence at the hearing. *Reed v. Cumberland Ins. Co.*, 146
3. The defendant's solicitor, in a foreclosure suit, obtained an order extending the time for answering, and filed his answer (setting up usury) within the time limited, but did not serve the order on complainant's solicitor, who entered a decree *pro confesso* after the original time for answering had expired. All the subsequent proceedings in the cause were had without his

Practice—Continued.

- knowledge of the existence of such order or answer.—*Held*, that the final decree was regular, and that the sheriff's sale under it would not be set aside. *Wrigley v. Jolley*, 168
- 4 A master's report had been duly and regularly confirmed, and a party against whom it was obtained applied to set aside the order of confirmation, to the end that he might except. The order was set aside on terms that the other party have leave (for which he applied) to take further testimony on the subject-matter of the exception. *Seigle v. Seigle*, 397
5. An oral announcement of an intention to appeal from a decree of the orphans court, or even an oral demand of an appeal, is insufficient. The demand must be in writing. *Claypool v. Norcross*, 524
- 6 A master's report should show in what way he arrived at his conclusion, so as to enable the court to ascertain from the report itself whether his method was right or not, especially in a case where more than a simple computation of the amount due is necessary. *Frazier v. Swain*, 156
- See* APPEAL, 1, 3; INSURANCE, 1; WILL, 9.

Presumption.

See DEED, 1; MORTGAGE, 5.

R.**Railroad.**

See PARTIES, 2; REFORMING INSTRUMENT, 1.

Receiver.

Where lands of an insolvent corporation are subject to a mortgage which is in dispute, an order may be made directing a sale, free from the mortgage, leaving the validity of the mortgage to be determined when the proceeds of the sale are disposed of. But a sale by a receiver, under an order directing a sale by public auction, without any mention of prior liens or encumbrances, will transfer the property to purchasers, subject to the lien of whatever encumbrances may be upon it, with the right of the purchaser, nevertheless, to contest the validity of apparent encumbrances, either with respect to their legal existence or the amount due upon them. *Hackensack Water Co. v. De Kay*, 548

See EXECUTORS, 11; MORTGAGE, 13, 14; PARTIES, 9; REFORMING INSTRUMENT, 1.

Reforming Instrument.

A deed for lands conveyed to the receivers of a railroad company

Reforming Instrument—Continued.

contained a covenant that the company would build and maintain certain fences thereon, and the receivers further agreed, verbally, that they would give the grantor an annual free pass over the railroad, and renew the same annually during his life. The deed was duly executed and given to the grantor's attorney to be delivered. The receivers objected to the insertion of the fence covenant in the deed, and promised to observe it if it were struck out, to which the attorney consented, and delivered the deed. The receivers built the fences as provided in the covenant, and also issued the pass to the grantor annually as long as they had control of the road. After the receivers had been relieved, and the re-organized company had taken possession of the road, they refused to keep the fence covenant or to deliver the annual pass to the grantor. On demurrer to the grantor's bill for specific performance—*Held*, that the deed might be reformed by inserting the covenant to build and maintain the fences, but that the complainant is entitled to no relief as to the annual pass, since no covenant on that head was in the deed, and the receivers had no power to bind their successors by such an agreement. *Martin v. New York, S. & W. R. R. Co.*,

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See MISTAKE, 1.

Rehearing.

1. On a creditor's bill to set aside as fraudulent a conveyance of land, the grantor and grantee answered, but only the former was sworn in the cause. There was a decree for complainant. On an application for a rehearing it was held that the allegation of the grantor (though sworn to by her) that she could not remember the facts of the transaction, and that when she informed her counsel of her intention to write to the grantee, who was absent from the state, to come home and testify, he told her it would be of no use, was not ground for granting the rehearing. *Perrine v. White*,

1

2. The petition to open a decree should state newly-discovered evidence. *McDowell v. Perrine*,

632

3. A rehearing will not be granted if the evidence proposed to be offered be merely cumulative. *Id.*,

632

4. Mistake or error of judgment in counsel is no ground for rehearing. *Id.*,

632

Release.

Voluntary declarations of a creditor of an intention to release a debtor, unless accompanied by some act which amounts to a release at law, will not operate as an equitable release. *Irwin v. Johnson*,

347

See MORTGAGE, 2.

Remainder.

A testator directed all of his estate to be sold, and the proceeds divided into six shares, which were to be given to his brothers and sisters, "the shares * * * to be paid to them on their own responsibility, and they to use it during their natural life, and at their decease, the said principal so paid to them to be divided among their lawful heirs, share and share alike." One of the sisters threatening to dispose of her share in order to defeat her son's interest therein, it was *held* that she might be enjoined from so doing, and required to give security for the protection of the remaindermen. *Sherman v. Sherman*, 125

See WILL, 6.

S.**Sale of Land.**

An officer selling under judicial process has a naked power to sell according to the mandate of the court. He may adopt conditions of sale amply sufficient to secure compliance by purchasers with their bids, but he cannot impose any liability upon purchasers with respect to the property sold which would not result by law from the purchase. *Hackensack Water Co. v. De Kay*, 543

See ESTOPPEL, 4; MORTGAGE, 12; PRACTICE, 3; RECEIVER, 1.

Schools.

See MUNICIPAL CORPORATION, 3, 4.

Set-Off.

See PLEADING, 3.

Sheriff.

In taxing a sheriff's fees on a sale of mortgaged premises, under the act of 1879 (*P. L. 1879 p. 177*), the taxed costs of the cause, excluding the sheriff's execution fees, must be included in computing the amount on which the sheriff's fees are calculated. *Crane v. Feltz*, 159

See EXECUTION, 1, 2.

Solicitor.

See EXECUTORS, 3; NOTICE, 1; PRACTICE, 3; REHEARING, 1, 4.

Sovereignty.

1. Except so far as congress may see fit to interfere for the regulation of commerce, each state has exclusive jurisdiction over the navigable waters lying within its territorial limits, and may pass such laws regulating their use as to it may seem wise. *Lister v. Newark Plank Road Co.*, 477

Sovereignty—Continued.

2. Which means of travel—the highway across the stream, or highway up and down the stream—is to be preferred, is a question which can only be decided by the legislature. *Id.*, 477

See WATER RIGHTS, 5.

Specific Performance.

1. The complainant, the holder of a second mortgage on lands, applied to the husband of the holder of the first mortgage (the husband being the owner of the equity of redemption) to purchase the first mortgage. The husband named a price, on condition that the complainant would also pay him \$350 for his equity, which proposition was accepted. The husband had no authority whatever to negotiate for his wife in the matter. On bill for specific performance—*Held*,

(1) That the wife, of course, could not be compelled to assign the first mortgage.

(2) That the agreement could not be enforced against the husband by substituting for performance, indemnity against his wife's interest in the premises as a mortgagee and dowress; there being no prayer for such relief in the bill. *Bradley v. Johnson*, 66

2. On bill for specific performance of an agreement for the purchase and sale of land, where the defendant's refusal to perform is based on alleged defects in the complainants' title, full statement and proof of the title will be required. *Cornell v. Andrus*, 321

See EXECUTORS, 8; PARTIES, 2.

Statutes of Great Britain.

29 Car. II. c. 3 § 5,	599
43 Eliz. c. 4,	306
1 Vict. c. 26 § 9,	602

Statutes of New Jersey (Private).

Camden and Atlantic R. R.,	<i>P. L.</i> 1852 p. 265,	13
	<i>P. L.</i> 1856 p. 12,	234
Hackensack Water Co.,	<i>P. L.</i> 1869 p. 133,	39, 560
	<i>P. L.</i> 1875 p. 256,	40
Newark Plank Road Co.,	<i>P. L.</i> 1849 p. 105,	479
	<i>P. L.</i> 1855 p. 353,	480

Statutes of New Jersey (Public).

Bridges	<i>Rev. p.</i> 87 § 13,	480
Chancery,	<i>Rev. p.</i> 118 § 76	579
Conveyances,	<i>Rev. p.</i> 167 § 79,	221

Statutes of New Jersey (Public)—Continued.

Corporations,	<i>Rev. p. 177</i> § 1,	560
	<i>Rev. p. 185</i> § 47,	558
	<i>Rev. p. 189</i> § 77,	439
	<i>Rev. p. 196</i> § 103,	440
Courts,	<i>Rev. p. 220</i> § 49,	605
Descents,	<i>Rev. p. 297</i> § 1,	472
	<i>Rev. p. 298</i> § 6,	298
Executors,	<i>P. L. 1879 p. 56</i> ; <i>P. L. 1881 p. 125</i> ,	424
Guardians,	<i>Rev. p. 466</i> § 6,	519
	<i>P. L. 1878 p. 326</i> ,	520
Lands and Conveyance,	<i>R. S. 1846 p. 613</i> § 18,	202
Leases,	<i>P. L. 1872 p. 93</i> ,	202
	<i>Rev. p. 167</i> § 79,	221
Mortgages,	<i>Rev. p. 706</i> § 27,	204, 326, 374
	<i>P. L. 1880 p. 255</i> ,	579
	<i>P. L. 1879 p. 177</i> ,	160
	<i>P. L. 1881 p. 185</i> ,	580
	<i>Rev. p. 709</i> § 41,	382
Municipal Corporations—		
Atlantic City,	<i>P. L. 1866 p. 330</i> ,	581
	<i>P. L. 1872 p. 590</i> ,	584
Elizabeth,	<i>P. L. 1863 p. 109</i> § 92,	340
Jersey City,	<i>P. L. 1871 p. 1094</i> §§ 81, 84, 151,	400
West Orange,	<i>P. L. 1871 p. 367</i> ,	405
Ordinary,	<i>Pat. 59</i> ,	604
Orphans Court,	<i>Rev. p. 765</i> § 67,	227
	<i>Rev. p. 791</i> § 176 ; <i>R. L. p. 783</i> § 21 ;	
	<i>Rev. p. 756</i> §§ 19, 20,	605
	<i>P. L. 1881 p. 130</i> ,	363
<i>Quia Timet</i> ,	<i>Rev. 1189</i> ,	18, 22
Railroads,	<i>Rev. 930</i> § 17 ; <i>P. L. 1880 p. 231</i> ,	11
	<i>P. L. 1881 p. 222</i> ,	320
	<i>Rev. 924</i> § 86,	333
	<i>Rev. 945</i> § 167,	335
Sheriff's Fees,	<i>P. L. 1879 p. 102</i> ; <i>P. L. 1882 p. 33</i> ,	160
Schools,	<i>Nix. Dig. 738</i> ,	581
	<i>P. L. 1882 p. 250</i> ,	585
Taxes,	<i>P. L. 1879 p. 54</i> ; <i>P. L. 1882 v. 118</i> ,	449
Wills,	<i>Allison 27</i> ,	599
	<i>P. L. 1851 p. 218</i> ,	600

Subrogation.

1. A farm was purchased at a sheriff's sale by one P., with the money of J., at whose direction P. conveyed the farm to F., who gave a mortgage thereon to A. and one to W., and then a deed to J., which was, in fact, a mortgage. Subsequently, F.

Subrogation—Continued.

conveyed the farm to N. J. afterwards bought W.'s mortgage, and had it assigned to and foreclosed by A. It also appeared that J. had other encumbrances on the farm prior to W.'s mortgage.—*Held*, that N. could not have the decree of foreclosure on W.'s mortgage assigned to him, on paying the amount, and be subrogated to the rights of J. thereunder, without also paying J.'s prior encumbrances. *Wyckoff v. Noyes*, 227

2. Where J. is the real complainant in a foreclosure of a mortgage on lands, and A. the ostensible one, and the county records show a prior mortgage on the same lands, standing in the name of A. (although it is proved never to have been delivered), and there is also a deed to J., which is, in fact, a mortgage, and the foreclosure bill makes no reference thereto, a sale of the premises under the decree will not be allowed until after the character and validity of the other encumbrances shall have been determined. *Id.*, 227
3. The principle of subrogation is one of equity merely, and it will accordingly be applied only in the exercise of an equitable discretion, and always with a due regard to the legal and equitable rights of others. *Gaskill v. Wales*, 527
4. W. lent money to G. to be secured by mortgage of land on which, it was agreed between them, it was to be the first encumbrance; it being agreed that part of the money should be used in paying off two mortgages already on the land. The mortgage was given and the former ones were paid off accordingly. They were canceled of record by W.'s attorney. Before W.'s mortgage was given, the mortgagor had begun a building on the land, and lien-claims for money due for work and materials were subsequently filed against the house and curtilage, and they were sold under judgment and execution thereon. The purchasers at that sale had no notice of any claim or right except what the records showed.—*Held*, That W.'s claim, to be substituted in the stead of the former mortgagee to the extent to which his money was used to pay them off, could not therefore be allowed. *Id.*, 527

See NOTICE, 6.

T.

Taxes.

1. A testator gave all his residuary estate (real and personal) to trustees, with a discretionary power to sell the real estate and to pay the income of the whole estate to his widow for life, or until her remarriage. The estate consists of mortgages, the homestead, which the widow occupies, and some unimproved city lots, which cannot now be sold advantageously. There is therefore no income or revenue except the interest on the

Taxes—Continued.

mortgages. The widow insists that the taxes on the unimproved property should not be paid out of that interest, but from sale of the lots.—*Held*, that the trustees must pay the taxes on the lots out of the interest received from the mortgages. *Combes v. Cadmus*,

382

2. This court has no jurisdiction to try the validity of assessments of taxes or of the certificates of sales of lands thereunder, where they are attacked for irregularity, or because the lien had expired before the sale was made, or because the sale was made for taxes on the land sold, blended with taxes on personalty. *Id.*,

382

See MUNICIPAL CORPORATION, 3; WILL, 6.

Trusts.

1. Where the relation of A to B is one of great trust and confidence, A's conduct will be regulated by a law of jealousy. He will not be permitted to keep anything obtained from B under the guise of a contract, unless his title is entrenched in the utmost good faith. It must have been acquired openly, and on a full and frank disclosure of every fact likely to influence B's conduct; and the conduct of A must be shown to be just and honest in every particular. *Porter v. Woodruff*,
- 174
2. The general interests of justice, and the safety of those who are compelled to repose confidence in others, demand that the courts shall inflexibly maintain the rule declaring that an agent employed to sell cannot make himself the purchaser, nor, if employed to buy, can he himself be the seller. *Id.*,
- 174
3. The moment an agent ceases to be the representative solely of his employer, and places himself in a position towards his principal where their interests may conflict, no matter how fair his conduct may be in the particular transaction, he ceases to be that which his service requires and his duty to his principal demands. *Id.*,
- 174
4. In such cases the courts do not stop to inquire whether the agent has obtained an advantage, or whether his conduct is fraudulent or not, but if the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, the courts will not speculate concerning the merits of the transaction, but at once pronounce it void as against public policy. *Id.*,
- 174
5. The reason of the rule is, that owing to the selfishness and greed of human nature, there must, in the great mass of transactions, be a strong antagonism between the interests of the seller and buyer, and universal experience shows that the average man, when his interests conflict with his employer's, will not look

Trusts—Continued.

- upon his employer's interests as more important or entitled to more protection than his own. *Id.*, 174
6. The object of the principle is to elevate the agent to a position where he cannot be tempted to betray his trust. To guard against uncertainty, all possible temptation is removed, and the prohibition against the agent acting in a dual capacity is made broad enough to cover all his transactions. *Id.*, 174
7. The rights of a principal will not be changed, nor the capacity of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under authority to purchase or sell a particular article at a specified price. *Id.*, 174
8. A trustee is bound to make safe investments, such as will yield a reasonable income, and a return of the principal when desired, and he ought not, as a general rule, to invest in second mortgages, but he will not be held personally liable simply because he has done so, in the absence of proof that loss has ensued or probably will ensue therefrom. *Commissioners of Somerville v. Johnson*, 211
9. The bare legal title, with no beneficial interest in the land, is sufficient to enable the holder to maintain ejectment, even against the person for whom he holds the legal title. *Id.*, 211
10. But a trustee cannot maintain ejectment against his *cestui que trust* when the facts justify a presumption that he has surrendered the legal estate to his *cestui que trust*. *Id.*, 211
11. A *cestui que trust* may bring an action at law in the name of his trustee, whenever necessary for the protection of the trust property, and the trustee can neither release the right of action nor discontinue the suit, but he may ask indemnity against costs. *Id.*, 211
12. Provision for the payment of bonds secured by a mortgage on defendants' railroad was made by agreement that the defendants should deposit a fixed amount of money annually, as a sinking fund, with the complainant as trustee, and the bonds themselves prescribed that the sinking fund should be invested in certain other specified bonds of the defendants.—*Held*, that the court would not, in the absence of the bondholders, direct the trustee to invest the sinking fund in other bonds of the defendants than those specified as secured by the same mortgage, but bearing a lower rate of interest, merely because the bonds required by the terms of the trust could only be purchased at a premium. *Fidelity Co. v. United Cos.*, 405
13. By the terms of an instrument creating a trust, the liability imposed on and assumed by the trustee may be limited. If there be a clause fixing the trustee's liability, the rule for measuring

Trusts—Continued.

such liability must be sought in that clause properly construed. A strict rule of construction will be applied as against such limitation on such liability, and the construction must be consistent with the object and purpose of the trust. *Tuttle v. Gilmore*, 617

14. Where a clause in an instrument creating a trust exempts the trustee from liability, except for willful and intentional breaches of trust, the trustee is not exempted from liability for losses arising from his having made sales or investments without instituting proper inquiries and exercising a reasonable judgment in respect to the value of the consideration or securities received, nor for losses arising from investments of trust-funds in second mortgages, where no circumstances are shown to justify a resort to such hazardous securities. The fact that the trustee neither made, nor intended to make, any personal gain from his acts, does not exonerate him from liability under that clause. *Id.*, 617

See PARTIES, 10; TAXES, 1; WILLS, 11, 12.

U.**Undue Influence.**

1. Whatever destroys free agency, and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of physical or mental coercion. *Earle v. Norfolk and New Brunswick Hosiery Co.*, 188
2. Undue influence is not measured by degree or extent, but by its effect. *Id.*, 188
3. When a deed is attacked on the ground of want of capacity in the grantor, the test is, did the grantor possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing? *Id.*, 188
4. On an issue whether a will is the product of undue influence, the declarations of the testator respecting previous occurrences which are alleged to have exerted the influence, are not evidence to prove or disprove such occurrences. *Rusling v. Rusling*, 603
5. The fact that a will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not of itself invalidate the will. *Id.*, 603

See WILL, 14.

Usury.

As between the original parties to a usurious loan, the taint of usury

Usury—Continued.

attaches to the transaction and to all substituted obligations and securities, until the usurious element is expunged. *Boyd v. Engelbrecht*,

612

V.

Vendor and Purchaser.

1. The right of a vendor of lands to a lien in equity for unpaid purchase-money, is now a part of the established jurisprudence of this state, and will be enforced, not only against the purchaser, but all who claim under him as volunteers or donees.

Porter v. Woodruff,

174

2. The lien of a vendor for unpaid purchase-money is entitled to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or an equitable advantage which does not give such advantage a superior claim to the legal estate.

Butterfield v. Okie,

482

3. A vendor's lien for unpaid purchase-money is entitled to prevail against the vendee's donee, whether the donee claims under a deed absolute or a mortgage. *Id.*,

482

4. The title upon record is a purchaser's protection if he purchases in good faith. *Frink v. Adams*,

485

See MORTGAGE, 7, 11; PLEADING, 3.

W.

Waiver.

See WATER RIGHTS, 1.

Water Rights.

1. A defendant claimed that a condition in a deed, which authorized his grantors to enter on complainant's lands and avoid a grant of a right to use certain water in case of the non-payment of the water rent, had been broken, and all of complainant's claim or right to the water thereby forfeited, and that therefore he was justified in cutting off or diverting the water from complainant's mill. The complainant claimed that, although the question whether it had been forfeited or not had not been settled at law, yet the defendant's deed contained a reference to the prior grant of the water under which complainant claimed, and therefore defendant had actual notice thereof; and further, that even if there might have been a forfeiture for want of prompt payment of the water rent, that the defendant or his grantors had waived that forfeiture by accepting such rent afterwards, and, further, that the injury to the mill by the diversion or deprivation of the water would be irreparable.—*Held*, that complainant was entitled to an injunction to prevent the threatened injury. *Fulton v. Greacen*,

216

Water Rights—Continued.

2. A diversion of a water-course by the authority of a riparian proprietor to enable a company to supply, in part, a village with water, is a legal wrong to another riparian owner who thereby sustains a perceptible and substantial damage. *Higgins v. Flemington Water Co.*, 538
 3. As between co-proprietors such a diversion is not a reasonable use of the common property. *Id.*, 538
 4. After entertaining a bill for such a wrong, and settling on final hearing the legal right of the complainant, a court of equity will not send him to law for redress, but will enjoin the defendant from making such diversion. *Id.*, 538
 5. The right of the public to use the navigable waters of the state for the purposes of navigation, is a right given by nature, and can only be taken away by legislation. *Lister v. Newark Plank Road*, 477
- See BRIDGE, 1; MORTGAGE, 8; MUNICIPAL CORPORATION, 1; PLEADING, 1; SOVEREIGNTY, 1, 2.

Will.

1. A testator gave a specified part of his homestead to his son, for life, and the other part to his daughters, for life, and the residue of his estate to the son and daughters, in equal parts, for their respective lives. The homestead was sold by the executors, the son's part producing \$24,000, and the daughters', \$26,000, all of which was invested by the executors, as well as the residue, in a common fund made up of those moneys and the rest of the estate, and the income therefrom divided according to the interests of the son and daughters therein.—*Held*, that those who are interested in the proceeds of the sale of the homestead are not entitled to preference, in respect of those proceeds, in the administration of the fund. *Tonnele v. Tonnele*, 70
2. A gift of personal property for life, with power to the legatee to use it as she may deem proper, or to sell it, or any part of it, for her benefit, as she may deem needful or best—*Held*, to be an absolute gift. *Kendall v. Kendall*, 91
3. A devise of a residue for the benefit of the testator's children, and in case of the death of them and their children without leaving any child or children them surviving, the residue to go, after the death of the testator's widow, to his "heirs bearing the Kendall name"—*Held*, a gift for life to the children (there being evidence that the testator intended to give only a life-estate to his children), with remainder in fee to the grandchildren with limitation over to the testator's heirs "bearing the Kendall name," in case of the death of the children, and

Will—Continued.

their children, without leaving lawful issue surviving, in the lifetime of the widow. *Id.*,

91

4. A testator gave the interest on \$10,000 to his daughter Elizabeth, without qualification, and after her death the interest on \$12,000 to his daughter Hannah, also without qualification. He then gave the residue of his estate to his executors in trust, for the use and benefit of Hannah for life, the interest to be paid to her "as she may need or require;" and after Hannah's death bequeathed that residue, "with whatever may have accumulated therefrom," to certain beneficiaries. Hannah is of weak mind.—*Held*, that she is entitled to only so much of the interest on the residuary fund as the executors may deem reasonably necessary, according to her station and situation in life. *Corlies v. Allen*,

100

5. After certain specific legacies, a testator directed his executors to keep the residue of his moneys safely invested, and to take charge of and let his two houses, one of them being his homestead, and to keep them insured, and to collect the rents, during the widowhood of his wife. He then gave to his wife for life or widowhood, "for the support of herself and for the support and education of such of my children as are now minors, so long as they shall remain in the family with their mother, the possession and use of my homestead-house," together with the furniture &c. therein; and directed his executors to pay the net rents and interest "to and for the support of my wife so long as she shall remain my widow and unmarried, and for the support and education of my children remaining with her as part of the family, as above mentioned." He then gave the residue of his personal property, on the death or remarriage of his widow, to his two daughters, Jennie and Rachel, and his homestead to Rachel in fee, and his other house to Jennie in fee, and all of his other property to Rachel and Jennie equally. He declared that the provision for his wife was in lieu of her right of dower. He then provided as follows: "I order and direct that my minor children shall, in any event, be supported respectively during their minority out of the said interest and rents to be collected by my executor, as hereinbefore provided." The widow is dead; the executor has settled the estate and ceased to act as trustee, having paid over the estate to the guardian of the minor children. Two of the children are still minors.—*Held*, that the interest and rents of the whole estate, including the homestead, must be appropriated to the support and education of the two infants, or so much thereof as may be necessary for that purpose. *Van Blarcom v. Van Winkle*,

103

6. A testator gave \$5,000 to each of his children who should survive

Will—Continued.

him, payable at the end of one year after his death, deducting therefrom any moneys due from any child or the husband of any daughter, as shown by his books of account, which were to be conclusive evidence of the fact and amount of such indebtedness "for all purposes under the will," and, if not paid, then to be retained by the executor from such delinquent's income, which was payable under a subsequent provision in the will. The net income of the residue was to be paid equally to the sons and daughters during their lives, with remainder to their children. The executors were also empowered to erect buildings, at their discretion, on designated lots of land in New York city, and on certain other lots there with the consent of the majority of the children then living.—*Held*,

(1) That each beneficiary of the residue was, after deducting the debt payable from that share, entitled to the net income thereon from the date of testator's death.

(2) That the debts due from the children or the daughters' husbands bore interest, and that the amount of such indebtedness was not limited to the amounts severally charged in the testator's books.

(3) That the appreciation in value of the unproductive property while awaiting a satisfactory sale by the executors, was a part of the *corpus* of the estate, and not of the income.

(4) That the cost of extensive repairs of the buildings, made in order to secure a better class of tenants and increased rents, must be paid out of the income.

(5) That the claim that interest should be allowed to the life-tenants on the moneys of the *corpus*, used in building new houses, to be computed from the time when the moneys were expended until the time when the houses were completed, could not be admitted.

(6) That ordinary taxes and expenses of improved lands must be paid out of the income, while assessments for permanent improvements may be equitably apportioned between the life-tenants and remaindermen.

(7) That the residuary estate, being held by the executors on a continuing, active trust, should not be divided even if a partition might appear practicable.

(8) That a reference would not be ordered to ascertain whether any more buildings ought to be erected in the state of New York, on the ground that it may be held that the will creates an unlawful estate under the laws of New York; the reference being unnecessary.

(9) That the unproductive land ought not to be divided, but an inquiry as to the propriety of the executors selling it, or any part of it, may be ordered.

Will—Continued.

(10) That no income from the residuary estate can be paid to beneficiaries until the debts to the testator charged on their shares are satisfied or secured. *Outselt v. Appleby*,

78

7. A testator directed that the defendant's share of his *personal* estate should be retained in the hands of his trustees, and the income thereof be appropriated to the defendant's support and maintenance, at their discretion. He further directed that defendant's share of his *real estate* should continue to be held in trust and the income alone thereof appropriated as he had previously directed in the case of defendant's share of the personal estate. On partition sale of testator's real estate—*Held*, that defendant's share of the proceeds must be retained by the trustees, and the defendant receive only the income thereof during his lifetime. *Cooper v. Cooper*,

121

8. A testator gave to his wife certain legacies for life, and then provided: "It is my wish that my wife, Margaret, shall have the privilege of occupying so much of the house in which I now live as she may need, during the time she remains my widow." He then gave his residuary estate to his son. The house stood on an ordinary town lot.—*Held*, that the fee of the house and lot passed to the son under the residuary devise, subject to the right of the widow to occupy, *personally*, so much of the house as she might need, during her widowhood, including the use of the curtilage, in common with the occupants of the remaining parts of the house. *Ingersoll v. Ingersoll*,

127

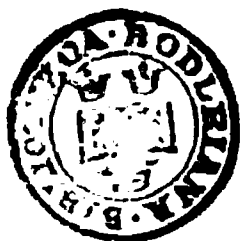
9. On a bill filed by certain of the beneficiaries of a will, whose legacies were charged on land, for its construction, and for an accounting, after it had been admitted to probate by the orphans court, all the legatees whose legacies were charged on the land being made parties—*Held*,

(1) That neither the legality of the execution of the will, nor the capacity of the testatrix, nor the existence of undue influence, could be tried in this court, although issue may have been joined thereon.

(2) That all of the legatees whose legacies were charged on the lands devised ought to be parties, and hence there was no misjoinder; nor if there were misjoinder could the objection be raised for the first time at the hearing.

(3) That a legacy to two churches, of \$5,000 to each church, charged on testatrix's lands, "the interest to be strictly applied and distributed to the poor members of said churches forever, and nothing else," is a valid, charitable gift.

(4) That the language of the gift, "five thousand dollars each, to be secured as by bond and mortgage upon the brick block of the five three-story houses at the southeast corner of Fifth and Clinton streets (two thousand dollars on each house),



Will—Continued.

- in the city of Camden" &c., after the death of the testatrix's husband, was sufficient to charge it on the lands described. *Trustees v. Wilkinson*, 141
10. The marriage of a woman does not revoke her will executed before such marriage. *Webb v. Jones*, 163
11. A widow made her will disposing of her property. She afterwards entered into a marriage settlement, whereby she assigned a very large part of her property (it was all personal) and the income thereof, and of all her other property, to trustees in trust for herself for life, and after her death to distribute the property assigned to certain persons whom she named, and who, with a few exceptions, were the same persons who were named as legatees in the will, reserving to herself, with the express assent of her future husband, a testamentary power of disposition over her estate, which was, by the settlement, put into the hands of her trustees. She was married and died without any further execution of the power.—*Held*, that her will was not revoked by her marriage, and was a good execution of the power. *Id.*, 163
12. Also, that the property assigned to the trustees must be distributed according to the terms of and under the settlement, and not under the will; but that under the circumstances the gifts to the legatees were adeemed to the extent of the provision made for them in the settlement. *Id.*, 163
13. That the husband waived or relinquished any rights of survivorship in the wife's remaining personalty by allowing her will to be probated. *Id.*, 163
14. Evidence that testatrix, after she made the will in question, denied that she had made a will, and said she would not make any, but would leave her children to share equally in her property, while it is competent to show that the will is spurious, and that the testatrix had not testamentary capacity, is not competent to show undue influence. *Barker v. Barker*, 259
15. Though fraud in procuring a will may be inferred, the inference cannot lawfully be drawn unless it is natural and necessary. And the court will refuse to impute fraud when the evidence does not necessitate a belief in its existence. *Dale v. Dale*, 269
16. In this case a mother gave all her property, with comparatively small exceptions, to one of her two sons. It appeared that she was of sound mind, and that when she made the will she harbored resentment against the other son, arising out of a business transaction between him and her. The son to whom she gave almost all her estate was on confidential terms with her, and acted as her amanuensis in giving instructions for the will, and aided her in obtaining the will from her lawyer, after it was drawn, to be executed. There was no evidence of

Will—Continued.

threats, restraint or coercion of any kind, nor even of importunity or persuasion, to induce her to make the will.—*Held*, that there was in the case no evidence of testamentary incapacity, nor any evidence of undue influence, and (reversing the decree of the orphans court) that the will must be admitted to probate. *Id.*, 269

17. Legacies which, with respect to amounts, are left in blank cannot be used to aid in construing the will. *Denton v. Clark*, 584

18. At the time of executing a last will there must be some word or sign by the testator, or some one acting for him, in his presence and hearing, to clearly indicate his recognition of the testamentary act in which he is engaged, and of the genuineness of the signature and will which are presented to the witnesses for their attestation. The words used in the statute, "acknowledgment" and "declare," demand an open expression either in words or unmistakable acts. *Ludlow v. Ludlow*, 597

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